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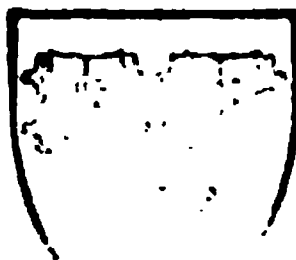
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF INDIANA.

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. WOODFIN D. ROBINSON.*
HON. WILLIAM J. HENLEY.†
HON. JAMES B. BLACK.
HON. DANIEL W. COMSTOCK.
HON. ULRIC Z. WILEY.

* Chief Judge at May Term, 1900.

† Chief Judge at November Term, 1900.

The term of office of each Judge began January 1, 1899.

OFFICERS
OF THE
APPELLATE COURT.

ATTORNEY-GENERAL,
WILLIAM L. TAYLOR.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1900, IN THE
EIGHTY-FOURTH AND EIGHTY-FIFTH YEARS
OF THE STATE.

HOLLIDAY v. CHISM.

[No. 3,330. Filed May 29, 1900.]

LANDLORD AND TENANT.—Sale of Real Estate.—Action for Possession.

—Parties.—Where a landlord conveyed real estate in the possession of a tenant, an action for possession must be brought in the name of the grantee or owner, although it was agreed that the grantor was to deliver possession at the termination of the lease, and that the tenant was to continue as the tenant of grantor until such delivery.

From the Howard Circuit Court. *Affirmed.*

J. C. Blacklidge, C. C. Shirley, Conrad Wolf and Charlton Bull, for appellant.

L. J. Kirkpatrick, J. F. Morrison, T. C. McReynolds and Josiah Stanley, for appellee.

WILEY, J.—This cause was transferred from the Supreme Court. The complaint was originally in three paragraphs, to the second and third of which a demurrer was sustained. Thereupon appellant dismissed as to the first, and elected to stand upon the ruling of the court in sus-

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taining the demurrer to the second and third paragraphs, and judgment was rendered against him for costs. By the assignment of errors the action of the court in sustaining the demurrer to the second and third paragraphs of complaint is presented for review.

The second paragraph avers that on the 1st day of September, 1895, appellant leased, in writing, to appellee, for a period of one year, certain real estate; that by the terms of the lease appellee was to have possession of the buildings thereon until March 1, 1897; that, subsequently, the time for the expiration of the lease was extended by mutual consent to August 31, 1897, at which time the appellee agreed to surrender the possession of the premises to appellant; that said time has long since passed, but appellee refuses to surrender the same; that there is on said real estate a large amount of growing clover, and standing corn, sown and planted under the terms of said lease, which belongs to appellant; that appellee has removed the fences protecting the orchard and exposed the same to the ravages of stock; that appellee refuses to surrender the possession of said premises, and avows his intention to hold the same, to pasture said clover, and trample said corn; that the damages that have thus been and will hereafter be inflicted thereon are irreparable, and that appellee is insolvent. It is then averred that, relying upon the agreement of appellee to surrender possession to appellant September 1, 1897, appellant, in May, 1897, sold the said real estate to one Troyer, agreeing with said Troyer, in consideration of said purchase, to secure from appellee and to deliver to such purchaser the full possession of said premises on the 1st day of September, 1897, and until said possession was secured, said appellee should continue and remain the tenant of appellant; that appellant agreed with said Troyer that he would protect said premises from injury and would indemnify him for any injury sustained after said sale. The prayer of this paragraph is that a temporary restraining

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order be issued, restraining appellee from committing further waste or damage; that he have possession of said premises, and have judgment for damages, etc.

The third paragraph is like the second, except it does not ask for injunctive relief, and it contains the additional averments that appellee knew when said lease was extended that appellant was contemplating a sale of the real estate, and that appellee agreed that if such sale was made he would surrender to the purchaser the possession September 1, 1897. The question thus presented is: Does the complaint show any right of action in appellant? Appellant concedes the rule to be that if a landlord conveys real estate in the possession of a tenant, and such conveyance is without any reservation, an action for possession must be brought in the name of the grantee or owner. This is evidently the view taken by the Supreme Court in transferring the case here, for if the relation of landlord and tenant does not here exist it is clear that this court is without jurisdiction. This court has not jurisdiction in possessory actions for real estate unless the relation of landlord and tenant exists between the parties. It follows from this that the Supreme Court must have held that at least one of these paragraphs of complaint, for the purposes of this action, showed that the relation of landlord and tenant did exist. Otherwise, the jurisdiction was in that court. In any event, the statute makes a transfer by either court to the other final. If appellant is the real party in interest, as shown by his complaint, then he may maintain the action; for, under the statute, an action can only be prosecuted by the real party in interest. §251 Burns 1894.

As to whether appellant can maintain the action under the averments of the complaint depends upon the construction of §§251, 1086 Burns 1894, §§251, 1073 Horner 1897. Section 251, *supra*, is as follows: "Every action must be prosecuted in the name of the real party in interest," etc. Section 1086 (1073), *supra*, reads as follows: "Any per-

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son having a right to recover the possession of real estate, or to quiet title thereto in the name of any other person or persons, shall have a right to recover possession or quiet title in his own name; and no action shall be defeated or reversed where it might have been successfully maintained by the plaintiff, in the name of another, to inure to his benefit," etc.

The case of *Chapman v. Jones*, 149 Ind. 434, is decisive of the question here presented. There appellees prosecuted an action to quiet title to real estate. The complaint averred that they had conveyed the real estate to certain persons, naming them; that their grantees had also conveyed the land to other persons, and that appellants were claiming some right or interest in said real estate, which they asserted was paramount to the title conveyed by appellees. It was urged by appellees that where an action of ejectment is brought, the defendant may notify his grantor, where the grant was by warranty deed, to come in and defend the title, and, upon such notice, he may be permitted to defend, and that when such notice is given, whether the grantor defends or not, the judgment, if in favor of plaintiff, will be conclusive upon such grantor that such successful plaintiff's title was paramount to such grantor's title. In deciding the question, the court said: "Conceding, without deciding, that such is the law, yet it would not follow that such grantor by warranty deed could prosecute a suit against one who might seize the possession of the land granted by him to another by warranty deed, for the purpose of protecting his warranty, or for any other purpose. To permit such a suit to be maintained would violate a fundamental principle of our code, requiring every action to be prosecuted in the name of the real party in interest. §251 Burns 1894, §251 R. S. 1881. So strong is this rule, that notwithstanding §1086 Burns 1894, §1073 R. S. 1881, authorizing any person having a right to recover the possession of real estate, or to quiet title thereto, in the

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name of another person or persons, to prosecute either action in his own name, it has been held that it must be construed along with §251, *supra*, so that, under the two sections, no such action can be brought in any other than the name of the real party in interest. *Peck v. Sims*, 120 Ind. 345. Prior to the enactment of §1086 (1073), *supra*, if lands were conveyed while in the adverse possession of a third person, a suit for possession could be prosecuted in the name of the grantor for the use of the grantee. *Steeple v. Downing*, 60 Ind. 478; *Burk v. Andis*, 98 Ind. 59. But that can no longer be done, under the two sections of the code. The action now must be brought in the name of the real party in interest, under the operation of the two sections," etc.

The case of *Peck v. Sims*, *supra*, is also in point, and it was there held that one who has conveyed land adversely occupied by another can not maintain an action in his own name to recover possession for the benefit of his grantee, and that such action must be brought in the name of the grantee, who is the real party in interest. The rule announced in these two cases is certainly a sound one. If the rule were otherwise, the party in possession might be harassed by two suits. If the grantor can prosecute the action, and should be defeated, then the grantee could also bring his action in ejectment, as he was not a party to the action of his grantor, and hence would not be bound by it. The party in possession would thus be harassed by a multiplicity of suits.

Each paragraph of the complaint affirmatively shows that Troyer was to have possession of the real estate conveyed September 1, 1897. It therefore appears that he was the real party in interest, and, under the statutes and the authorities cited, was the only person authorized to prosecute an action against appellant for possession. The court correctly sustained the demurrer to the second and third paragraphs of complaint.

Judgment affirmed.

Gemmill v. Brown.

GEMMILL v. BROWN.

[No. 2,556. Filed March 6, 1900. Rehearing denied June 5, 1900.]

SEDUCTION.—Complaint.—Promise of Marriage.—A complaint for seduction, which alleges promise of marriage as one of the means employed by defendant to accomplish his purpose, is not bad for failure to aver that defendant failed and refused to keep that promise. *p. 10.*

SAME.—Complaint.—Plaintiff's Chastity.—In an action for seduction the complaint need not aver the former chastity of plaintiff. *p. 10.*

VENUE.—Number of Changes.—When a party is granted one change of venue from the county, whether it is perfected or not, the party who asks it can have no other change. *p. 11.*

SEDUCTION.—Evidence.—Financial Condition of Defendant.—In an action by a woman for her own seduction, it is not error to permit the defendant to testify as to his financial condition. *p. 11.*

TRIAL.—Deposition as Evidence.—By Whom Read.—Where a party who took a deposition offered the same at the trial, but read only the examination in chief, it was not reversible error for the court to permit the party against whom the deposition was taken to read the cross-examination and re-cross-examination thereof, if the deposition was read in consecutive parts, and went to the jury as a whole. *pp. 12-14.*

SAME.—Practice.—Admission of Deposition Taken in Another Cause Under Alleged Agreement.—Where, on the trial of an action, a party seeks to introduce in evidence a deposition taken in another cause, upon an alleged agreement that the deposition should be so used, and the question as to whether or not such agreement had been made is submitted by means of affidavits and counter affidavits, the ruling of the trial court thereon will not be reviewed on appeal, unless it appears that the trial court abused its discretion. *p. 14.*

SEDUCTION.—Evidence of Prior Unchastity.—For What Purpose Admissible.—In an action by a woman for her own seduction, evidence of specific acts of immorality on her part, prior to the time of the alleged seduction, is admissible in mitigation of damages, and as tending to show that she was not seduced. *p. 16.*

INSTRUCTION.—May Contain More Than One Proposition of Law.—An instruction is not bad because it embraces more than one proposition of law. *p. 16.*

SEDUCTION.—Measure of Damages.—In an action for seduction the plaintiff may recover damages for her anguish of mind and her pain and suffering incident to the birth of a child, the fruit of such seduction. *p. 16.*

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SEDUCTION.—*When Several Acts of Intercourse Constitute the Elements of One Wrong.*—Where, in an action for seduction, successive acts of intercourse are shown to have occurred under a promise of marriage, and by arts, wiles, persuasions and solicitations on the part of the defendant, the several acts of intercourse may be regarded as constituting the elements of one wrong. *p. 17.*

INSTRUCTIONS.—*All Construed Together.*—If the instructions given, all taken together, state the law correctly, and are not calculated to mislead the jury, the judgment will not be reversed on appeal, though one or more of the instructions standing alone do not correctly state the law. *p. 18.*

From the Adams Circuit Court. *Affirmed.*

J. J. M. LaFollette, D. T. Taylor and O. H. Adair, for appellant.

E. R. Templer, C. C. Ball, J. N. Templer and W. H. Williamson, for appellee.

WILEY, C. J.—The record shows that the original pleadings were lost, and the cause proceeded to final judgment upon substituted pleadings. The appellee was plaintiff, and sued appellant to recover damages for her seduction. Her complaint was in two paragraphs; and a demurrer thereto was overruled. Appellant answered by general denial. The cause was tried by a jury, and resulted in a general verdict for appellee for \$3,000. Over appellant's motion for a new trial, judgment was rendered on the verdict. The overruling of the demurrer to the first and second paragraphs of complaint and the overruling of the motion for a new trial are assigned as errors.

In determining the sufficiency of the complaint, a general statement of its allegations will not be out of place. It is charged that appellee was at the time of the alleged seduction, and still is, an unmarried female, under the age of twenty-one years; that in March, 1891, when she was only fifteen years old, at the solicitation and request of appellant, she went to live with him and his family; that at that time he was a widower, and still is an unmarried man; that appellant's family consisted of himself and two small children; that he was over fifty years old, was, and still is a man

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of large wealth and influence; that appellant then agreed with appellee that she would live with him and his family; that he would treat her as one of his own children; that she should go to school with his children, and that he wanted her to go with them for company; that he promised her and her parents to be kind to her and treat her right; that it was agreed that appellee should help in and about the household work, and aid in looking after and caring for appellant's children; that, in pursuance to said arrangements, she did go and make her home with appellant, and so remained until 1894; that from March, 1891, until the grievances complained of, appellant did treat her in a kind and affectionate manner; that he frequently expressed to her his love and admiration; that he frequently embraced and caressed her; that he gave to her valuable gifts, and promised to marry her. The complaint then contains the following averments: "And the plaintiff avers that, by reason of such kind and affectionate treatment by defendant of plaintiff, and on account of defendant's declarations of love and affection for plaintiff, and of his presenting her with gifts and presents, and on account of defendant's promise to make plaintiff his wife, he, the said defendant, thereby gained the plaintiff's esteem, respect, and confidence; and the plaintiff says that after the defendant had, in manner and form above pleaded, gained the plaintiff's affections and confidences that the said defendant, with wicked and unlawful design and purpose to betray her confidence and accomplish her ruin, did, on or about the — day of October, 1892, at the defendant's said home, solicit and importune plaintiff to sexual intercourse with him, said defendant, and, to induce her to submit to his embraces, again promised to make her his wife, whereby, and by reason of her love and affection for, and her confidence in him, said defendant, she was induced to and did have sexual intercourse with him on said day." The above quotation is from the first paragraph of the complaint, and in connection with the general statement which

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precedes it is all that need be quoted or stated to dispose of the objections urged to it. As to the general averments, the second paragraph is substantially like the first, but contains the following: "And the plaintiff avers that the said defendant, totally disregarding the promises and agreements made to the plaintiff and her parents, as aforesaid, and wickedly intending to wrong, injure, debauch, and seduce plaintiff, took advantage of her youth and inexperience, of her position as a member of his family, as aforesaid, and of his experience and position, and with the wicked and corrupt intention and designs aforesaid the said defendant did, for the purpose of gaining the confidence, love, and respect of plaintiff, and to induce her to submit to his embraces and have sexual intercourse with him said defendant did, at various times, and from time to time, express his love and affection for plaintiff, and did embrace and caress plaintiff, and plaintiff says defendant made her many valuable presents and was kind and considerate toward plaintiff, and would and did take plaintiff riding, and said to plaintiff at various times that he thought she would make him a nice wife, that he loved her, and at divers times asked plaintiff if she thought he was too old for her, and if she loved him, and asked plaintiff if she thought she could live happily with him; whereby and by reason of which the plaintiff says that the said defendant, by the means of the said several promises, and his said expressions of love and affection for plaintiff, and by reason of the said uniform kind and affectionate treatment by defendant of plaintiff, the defendant did thereby gain her confidence and affections; and the plaintiff says that said defendant, having thus gained the plaintiff's confidence and esteem, did on or about the — day of October, 1892, at the said home of defendant, at said county and State, solicit and importune her to sexual intercourse with him; and, to induce her to submit to his embraces, defendant told her that she ought to submit to him, that there would be no wrong in her doing

so, that he would protect her, and he promised to make her his wife; whereby, and by reason of her youth and inexperience, and by reason of her affection for him, and by reason of her confidence in defendant, she was induced to and did have sexual intercourse with him on said day, and at various times thereafter."

The first objection urged to the complaint is that it does not aver a failure or refusal of appellant to keep and perform his alleged promise to marry appellee. Counsel urge that it is the theory of each paragraph of the complaint that the alleged seduction was brought about by appellant's promise to marry appellee, and that the complaint, omitting to charge that he failed and refused to keep that promise, makes it bad. If this were an action for a breach of a marriage contract, such averment would be necessary. From the allegations of the complaint which we have just quoted, it is evident that it does not proceed alone upon the theory that the seduction was brought about by the promise of marriage, but merely as one of the elements or means employed by appellant to accomplish appellee's seduction. But a promise of marriage is not a necessary element in seduction. In *Ireland v. Emmerson*, 93 Ind. 1, the court said: "A promise of marriage is one of the means often resorted to by the seducer to accomplish his purposes; but such promise is by no means a necessary element in seduction. That is, seduction may be accomplished without any promise of marriage."

The next objection to the complaint is that the first paragraph is insufficient because it does not aver that at and before the seduction appellee was a chaste and virtuous woman. Such allegation is unnecessary. To maintain her action it was unnecessary for appellee to prove her chastity, for the presumption of the law is in favor of a woman's chastity. *Robinson v. Powers*, 129 Ind. 480. It being unnecessary to prove it, it was unnecessary to aver it, for a plaintiff is not required to aver more than is necessary to

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prove. This disposes of all objections urged to the complaint.

The motion for a new trial contained thirty-six reasons, and we will consider them in the order in which counsel have discussed them. (1) That the court erred in overruling appellant's motion for a change of venue from the county. This cause originated in Jay county. Appellant appeared to the action, and moved, on affidavit, for a change of venue from the county. His motion was sustained, and the venue was ordered changed to the Adams Circuit Court, and he was given fifteen days in which to pay costs and perfect change. He permitted the time to lapse without perfecting his change of venue, and the court afterwards taxed all costs up to that date, to him. Section 417 Burns 1894, provides that "only one change of venue shall be granted to the same party from the county," etc. This statute has often been construed, and the rule deduced from the unbroken line of authorities is that when one change is allowed or granted, whether it is perfected or not, the party who asked it can have no other change. The making of the order ends his right. He has then had the one change of venue allowed him, whether he avails himself of it or not. When a party applies to a court for a change of venue, it must be presumed that the application is made in good faith, and not for delay, but because the party asking it really believes he can have a fairer trial elsewhere. *Michigan, etc., Ins. Co. v. Naugle*, 130 Ind. 79; *Musselman v. Pierce*, 40 Ind. 120; *Mershon v. State*, 44 Ind. 598; *Shriver v. Bowen*, 57 Ind. 266; *Musselman v. Pratt*, 44 Ind. 126; *Hutts v. Hutts*, 62 Ind. 240; *Indianapolis, etc., R. Co. v. Smythe*, 45 Ind. 322.

(2) That the court erred in permitting appellant to answer the following question, while testifying for appellee, viz.: "How much land do you own, Mr. Gemmill, in the farm on which you live," etc. In cases of this character it is proper to inquire as to the financial condition of the

defendant, and this question was directed to that fact. Such financial condition is a matter pertinent to the issue, which the jury may consider in awarding damages, if they find for the plaintiff. In *Shewalter v. Bergman*, 123 Ind. 155, the court, by Elliott, J., on page 159, said: "In an action by a woman for her own seduction, it is proper to give evidence of the financial standing of the defendant," citing *Wilson v. Shepler*, 86 Ind. 275; *Clem v. Holmes*, 33 Gratt. 722; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442, and note. Again, in *White v. Gregory*, 126 Ind. 95, the court said: "Evidence of the pecuniary condition of the appellant [who was the defendant below] was admitted, and this is complained of. The authorities are not uniform upon the subject of the admissibility of such evidence, but the rule as settled in this State allows of its reception. The ground upon which such evidence is received is, that actions for seduction are given not only as a means of compensating the injured party but for the punishment of the seducer as well, and that what might be an adequate punishment to one person might be no punishment to another of great wealth. Besides, the pecuniary circumstances and situation of the seducer may have contributed largely with other artifices, persuasions, promises and professions employed, to accomplish the ruin of his victim." See, also, *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; *Gruble v. Margrave*, 3 Scam. 372, 38 Am. Dec. 88; *White v. Murtland*, 71 Ill. 250; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

(3) The question presented by the third reason for a new trial relates to the same subject-matter as the one we have just disposed of, and need not be further noticed.

The fourth to thirty-first reasons for a new trial, except the eighteenth and twenty-eighth, question the ruling of the court in admitting, and refusing to admit, and in refusing to strike out certain specified evidence. Counsel for appellant have taken forty-three pages of their very lengthy

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brief to discuss these several questions, and to attempt to take them up *seriatim* and dispose of them in the order in which they are discussed would extend this opinion to an unreasonable length, without corresponding fruitful benefits. We have, however, examined every question there presented, which runs through a record of over 1,000 pages, and we are unable to reach the conclusion that in the admission and rejection of any of the evidence complained of the court committed any reversible error. Appellant took the deposition of one Jennie Walker, which was offered and read in evidence. At the taking of the deposition, the appellee appeared by counsel and cross-examined and re-cross-examined the witness. The appellant's counsel offered the deposition at the trial, and read the examination in chief. Thereupon counsel for appellee demanded the right to read the cross and re-cross-examination, to which appellant objected, and the objection being overruled, counsel for appellee read to the jury the cross and re-cross-examination. This action of the court is assigned as the eighteenth reason for a new trial. Appellant argues that as it was his deposition he had the right to read all of it, and hence it was error to permit appellee to read the cross and re-cross-examination. In support of this argument, our attention is called to the case of *Scott v. Indianapolis Wagon Works*, 45 Ind. 75, upon which appellant relies. In that case plaintiff took the deposition or examination of the defendant, under the statute. Upon the trial, the plaintiff (appellee), over the objection of defendant (appellant), was permitted to read the examination in chief, without reading the cross-examination, and it was stated by counsel at the time that the defendants might read the cross-examination when they came to introduce their evidence. The court said this was not a proper practice, but as the record showed that all that part of the deposition which the plaintiff did not read was read by the defendants when they came to adduce their evidence, there was no substantial error with

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reference to the reading of the deposition. In the case we are considering, it appears from the record that the entire deposition of Jennie Walker was read in consecutive parts, and that it all went to the jury as a whole. While it may be the better practice for the party offering a deposition to read the whole, yet we are not prepared to say that it is error for it to be read as it was in this case. Courts of last resort do not reverse causes for irregularities, unless such irregularities amount to errors which have prejudiced the rights of the complaining party. As all the deposition was read to the jury, and read in consecutive parts, we are clear that the irregularity complained of did not rise to the magnitude of an error, for which the judgment should be reversed.

At the time this action was pending in the Jay Circuit Court, there was also another action by appellee against appellant for a breach of an alleged marriage contract. In the latter action, appellant took the deposition of one Joseph Gemmill, and upon the trial of this case offered to read in evidence a copy of that deposition, to which appellee objected, and the objection was sustained. This action of the court is challenged by the twenty-eighth reason for a new trial. The offer to read such copy was based upon an alleged agreement between the attorneys to that effect. As to whether there was such agreement must be determined from the affidavits *pro* and *con*. This question was presented to the trial court upon such affidavits; and from them the court could have, and, doubtless did arrive at the conclusion that there was no such agreement. The court having passed upon the question, we could not disturb its ruling, unless we could say that it abused its discretion, and this we can not do.

The thirty-second, thirty-third, thirty-fourth, and thirty-fifth reasons for a new trial call in review the action of the court in giving, in refusing to give, and in modifying, and giving as modified, certain instructions. Before the beginning of the argument, counsel for appellee requested all

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instructions to be given in writing, and tendered a series of instructions, numbered consecutively from one to thirty-one, and asked that they be given. Of these the court gave all but the fifth, eighth, ninth, and thirty-first. To the giving of the other instructions tendered by the appellee, the appellant excepted, and has brought the instructions, together with the exceptions noted thereon and signed by the judge, into the record by a bill of exceptions. Counsel have discussed at great length their objections to these several instructions, and, to follow that discussion and give the substance of the instructions, which we would have to do to present and discuss them intelligently, would extend this opinion to an unreasonable length. The first, second, third, fourth, sixth, seventh, tenth, eleventh, and twelfth of these instructions are confined to explaining to the jury that they are the judges of the credibility of the witnesses; how they may determine such credibility; that they are to determine the weight of the evidence, and how to determine it; and how the preponderance of the evidence may be determined. We are unable to see any objection to the instructions indicated, and the criticisms upon them are not well grounded. In not a single instance did the court invade the province of the jury. The thirteenth, fourteenth, fifteenth, and twenty-fourth instructions directed the minds of the jurors to the question of damages in case they should find for the appellee, and fully covered the law applicable thereto, as to the measure of damages. Counsel for appellant have not cited a single authority to support their argument, and a careful examination of the instructions leads us to the conclusion that they fairly and fully state the law governing the question of damages in cases of this character. By the sixteenth, seventeenth, eighteenth, twenty-first, and twenty-third instructions, the court told the jury what acts would constitute seduction, within the meaning of the law, and they fully covered the subject. The instructions upon this subject are particularly clear, direct, concise, and to the

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point. In the nineteenth, twentieth, and twenty-fifth instructions, the court told the jury that the law presumed that appellee was a virtuous woman up to the time of the acts complained of, and that evidence of specific acts of immorality, if any, prior to that time could only be considered by them for two purposes, if they found that appellant seduced her, to wit: (1) In mitigation of damages, and (2) as tending to show she was not seduced as alleged. That a person of previous unchaste character may recover damages for her own seduction, and that her character before seduction may be shown in mitigation of damages seems to be well settled. *Smith v. Milburn*, 17 Iowa 30; *Robinson v. Powers*, 129 Ind. 480. The law presumes in favor of a woman's chastity. *Robinson v. Powers, supra*; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696.

In the twenty-sixth instruction, the court told the jury that if they found that previous to the alleged seduction appellee had sexual intercourse with another man or men and thereafter reformed and resolved to lead a virtuous life, and was of good repute, etc., and that if appellant did thereafter seduce her, and as the fruit of that seduction she was begotten with child, then their verdict should be for the appellee, and they should award her such damages as would fully compensate her for her loss of reputation, for the pain and suffering of body, and anguish of mind, caused by the seduction, and the begetting and birth of the child. While more than one proposition of law is embraced in this instruction, it is not bad for that reason. That a woman may stray from the paths of virtue, and subsequently reform, and thereafter lead a virtuous life, there is no doubt. While in this condition, she may also be seduced, and as a result of such seduction recover such compensatory damages as she may suffer. As a part of the measure of such damages, she may recover for her anguish of mind and her pain and suffering incident to bearing and giving birth to a child, the fruit of such seduction. These propositions

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are amply sustained by the authorities. *Robinson v. Powers*, 129 Ind. 480; *Patterson v. Hayden*, 17 Ore. 238, 3 L. R. A. 529, 11 Am. St. 822; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Smith v. Milburn*, 17 Iowa 30; *Weaver v. Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159, note 171; *McCoy v. Trucks*, 121 Ind. 292; *Gunder v. Tibbits*, 153 Ind. 591.

There is evidence in the record from which the jury could find that appellant, by means of a promise of marriage, by his arts, wiles, persuasions, and solicitations, induced appellee to have sexual intercourse and that subsequent to the first act of intercourse, by the same inducements, the act was repeated several times. In the twenty-seventh instruction the jury were told that if they found such acts to have taken place in the manner alleged, that they might regard said several acts of intercourse as constituting elements of one wrong. This instruction is in line with the authorities, and it correctly stated the law. *Haymond v. Saucer*, 84 Ind. 3; *Gunder v. Tibbits*, *supra*. In the latter case many authorities are collected and cited upon this question, and we refer to them without comment.

Any question as to the twenty-eighth, twenty-ninth, and thirtieth instructions is waived by appellant by the failure of counsel to discuss them. The record shows that the court refused to give the thirty-first instruction tendered by appellee. Why counsel discuss it, and complain that it was error to give it, we are not advised. The record speaks absolute verity, and as it shows that the instruction was not given, we cannot consider it as having been given. The appellant tendered and asked to be given to the jury twenty-three instructions. Of these the court gave the first, second, third, fourth, fifth, sixth, thirteenth, fourteenth, and fifteenth, and refused to give the seventh, eighth, eleventh, twelfth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second, and gave as modified the ninth and tenth.

The thirty-third reason assigned for a new trial was that the court erred in refusing to give the instructions above indicated as tendered by appellant. We are satisfied that there was no error in this refusal. Without being specific, it is sufficient to say that some of the instructions refused had been substantially covered by other instructions, and, while they may have stated the law correctly, it was not error to refuse them. *Hamilton v. Hanneman*, 20 Ind. App. 16; *Siberry v. State*, 149 Ind. 684; *Dale v. Jones*, 15 Ind. App. 420; *Eureka, etc., Co. v. Bridgewater*, 13 Ind. App. 333; *Lake Shore, etc., R. Co. v. Anthony*, 12 Ind. App. 126.

The other instructions refused were properly refused, because they did not correctly state the law applicable to the facts. The modification of instruction number ten, as tendered by appellant, and giving it as modified, does not present any question, as the record does not show the modification, and appellant's counsel admit this. This disposes of all questions arising under the instructions that have been discussed. Construing the instructions as a whole, we are of the opinion that they correctly state the law applicable to the pleadings and the evidence, and while we might not be able to approve one or more of them, standing alone, yet it is apparent that the jury was not in any sense misled. In such case, even if one or more of the instructions standing alone did not correctly state the law, it is not cause for reversal. *Shields v. State*, 149 Ind. 395; *Todd v. Danner*, 17 Ind. App. 368; *Archibald v. Harvey*, 23 Ind. App. 30; *Lofland v. Goben*, 16 Ind. App. 67; *Masons, etc., Assn. v. Brockman*, 20 Ind. App. 206.

The thirty-fifth and thirty-sixth reasons for a new trial are, (a) that the verdict is not sustained by sufficient evidence, and (b) that the verdict is contrary to law. These two reasons present substantially the same question, and both depend on the evidence. There is an abundance of evidence to support every material averment of the complaint,

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and hence the evidence is sufficient to sustain the verdict, as we have held that the facts pleaded constitute a cause of action. Upon some questions there is a conflict in the evidence, but this court, in such case, does not weigh the evidence. There being evidence to support the verdict and judgment, we are bound by the conclusion reached by the trial court in rendering judgment thereon. We refrain from citing authorities in support of this familiar rule.

We do not find any reversible error in the record. Judgment affirmed.

PETERSON ET AL. v. STRUBY.

[No. 3,044. Filed March 13, 1900. Rehearing denied June 5, 1900.]

ATTORNEY AND CLIENT.—*Lien for Fees.—Judgments.*—Attorneys at law successfully prosecuted an action for their client, and filed a lien on the judgment for their stipulated fee, and, thereafter, the client, without the knowledge or consent of the attorneys, assigned the judgment to a third party without consideration; later, the assignee of the judgment, without the knowledge or consent of the attorneys, and without consideration, satisfied the judgment of record. *Held*, that the lien was in no way affected by the transaction, and that the assignee did not become personally liable to the attorneys. *pp.* 21-25.

APPEAL.—*Assignment of Errors.*—An assignment of errors, that “the court erred in its special findings thirteen, fifteen, and sixteen, and also in overruling appellants’ motion to strike out said findings,” does not present any question on appeal. *p.* 25.

SAME.—*Record.—Bill of Exceptions.*—The record must affirmatively show that a bill of exceptions was filed in the clerk’s office; the stencil file mark of the clerk indorsed thereon is not sufficient. *pp.* 26, 27.

SAME.—*Inconsistent Special Findings.—New Trial.*—That certain special findings are inconsistent with other findings is not a reason for a new trial. *p.* 28.

From the Adams Circuit Court. *Affirmed.*

B. K. Elliott, W. F. Elliott, F. L. Littleton, R. S. Peterson and R. K. Erwin, for appellants.

J. T. France and C. O. France, for appellee.

WILEY, C. J.—Appellants are partners, engaged in the practice of law. They sued appellee to recover for services

as attorneys in prosecuting to a successful termination an action for damages in favor of Eli W. Middleton against John O. Middleton, in the Adams Circuit Court, and bot-tomed their action upon the following facts, as stated in their complaint: That they entered into a contract with Eli W. Middleton to prosecute the action against John O. Middleton, and for their services they were to receive and have a sum equal to ten per cent. of the amount recovered; that, in pursuance to said agreement, they did prosecute said action to a final termination, and recovered a judgment in favor of their client for \$10,000; that appellee at the time, or shortly thereafter, had full knowledge of all of said facts; that, by an agreement between appellants and their client, they were to take a lien upon said judgment for the amount of their fee; that, in pursuance to said agreement, they did file such lien, and in all things complied with the statute in such case made and provided; that long after the rendi-tion of said judgment and the filing of said lien, the said Eli sold, assigned, and transferred said judgment, upon the record, to appellee; that appellee took an assignment of said judgment with knowledge of said lien; that after the assign-ment of said judgment the appellee received full payment thereof, including the amount due appellants as attorneys' fees, and that such payment was made without the knowl-edge or consent of appellants; that at the time of said judg-ment, and ever since, the said John O. has been and still is insolvent. It is also averred that when said judgment was assigned the said Eli was, and still is, insolvent. It is then averred that appellee refused to pay said attorneys' fees, though a demand and a request therefor had been made, and that said sum is still due. Copies of the lien and also of the assignment are filed as exhibits.

The above averments are taken from the first paragraph of complaint. The second paragraph is like the first, with these additions: That when said assignment was made it was agreed and understood between Eli and appellee that

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appellee should assume and pay appellants' lien, and that after said assignment appellee released said judgment on the margin of the record, said release being in the following words: "I hereby release all right, title, and interest I may have in the annexed judgment against John O. Middleton, in favor of Eli W. Middleton, and assigned to me by Eli W. Middleton on the 11th day of September, 1895. Witness my hand this 17th day of July, 1897, and said judgment is fully satisfied so far as I am concerned. [Signed] Jane Struby."

The issue was joined by an answer in denial, trial by the court, and at request of appellee the court made a special finding of facts, and stated conclusions of law thereon. The conclusions of law were favorable to appellee, to which conclusions appellants excepted. The appellants' motion for a new trial was overruled.

The only assignment of error that presents any question for review is the second, which challenges the conclusions of law. The correctness of the conclusions of law depends upon the facts found. By the facts found it appears that appellants were employed by Eli W. Middleton to prosecute an action for damages against John O. Middleton, upon an agreement that they were to receive for their services a sum equal to ten per cent. of the amount recovered; that they did recover a judgment for \$10,000; that, following the rendition of said judgment, appellants filed a lien thereon upon the margin of the record for \$1,000; that said judgment was rendered November 12, 1891; that on the 11th day of September, 1895, in the absence of appellants, Eli W. Middleton assigned said judgment to appellee, said assignment being made upon the margin of the record, where it was entered; that the said Eli assigned said judgment to appellee, in order that the same might be charged against the said John O. Middleton in the distribution of her estate; that appellee was the mother of both Eli and John Middleton and of two daughters; that on June 17, 1897, without the

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knowledge or consent of appellants, appellee released her interest in said judgment in the language above set out; that no part of said judgment was ever paid to the said Eli or appellee, nor did the appellee ever receive anything of value thereon, or for the satisfaction thereof; that no part of said judgment or lien was ever paid to appellants, and that the same remains wholly unpaid; that appellee never agreed with appellants, or any one else, to pay a part of appellants' said lien; that, before the commencement of this action, the appellants demanded payment of said lien from appellee, and that there is due them \$1,490.73. The conclusions of law as stated by the court are as follows: (1) "That the defendant is not indebted to the plaintiffs." (2) "That the plaintiffs take nothing by their suit."

The record shows that the lien of appellants upon the judgment obtained by them for their client was taken in pursuance to the provisions of the statute. §7238 Burns 1894, §5276 Horner 1897. No question is raised as to its validity. The judgment was rendered November 12, 1891, and on September 11, 1895, the judgment plaintiff assigned the judgment to appellee. The assignment was in conformity to the provisions of §612 Burns 1894, §603 Horner 1897, providing for the assignment of judgments. July 17, 1897, appellee, as the assignee of the judgment plaintiff, released the judgment of record so far as her interest therein was concerned. This assignment and release of the judgment were without the knowledge or consent of the appellants. The court found as a fact that appellee did not receive any money upon the judgment, nor did she receive anything for entering the release. We have no doubt but what an assignee of a judgment, where such assignment is shown of record, may enter satisfaction of it, and the question which is of controlling influence here is, under the facts found,—does such release destroy the lien of appellants? If it does, they might properly proceed against appellee; but if it does not, then they have no right of action

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against her. The lien attaches to the judgment, and it also attaches to the proceeds of the judgment. But in this instance there were no proceeds, as nothing was paid upon it. It is found that appellee took the assignment of the judgment, to the end that it might be charged against John O. Middleton in the distribution of her estate. It appears, therefore, that there was no consideration moving from Eli, the judgment plaintiff, to appellee, for the assignment, and no consideration for appellee's release of the judgment. Under these facts, we are inclined to the view that appellants' lien has not been affected. The lien of an attorney for his fees, if validly entered, cannot be discharged without his authority by any act of the judgment plaintiff. Watson's Indiana Stat. Liens, p. 40, §42.

In *McCabe v. Britton*, 79 Ind. 224, it was held that if an attorney had acquired a valid lien upon the judgment procured by his services, his right to collect the amount by execution upon the judgment was not affected by the satisfaction of the judgment. An attorney's lien properly acquired upon a judgment cannot be defeated by a discharge of the judgment given by his client to the judgment debtor. *Foster v. Danforth*, 59 Fed. 750; *Gammon v. Chandler*, 30 Me. 152; *McKenzie v. Wardwell*, 61 Me. 136; *Stratton v. Hussey*, 62 Me. 286; *Rooney v. Second Avenue R. Co.*, 18 N. Y. 368; *Woolf v. Jacobs*, 45 N. Y. Supp. 583.

If the appellee had received the amount of the judgment, then appellants, under the authorities, might recover from her the amount of their lien, as for money had and received. *Heartt v. Chipman*, 2 Aik. (Vt.) 162. Or, as was held in Arkansas, they might enforce their lien against her as assignee of the judgment, if she had received the avails and discharged the judgment. *Sexton v. Pike*, 13 Ark. 193. But here the court finds that appellee did not receive any money upon the judgment. The assignee of a judgment takes the equitable title to it, subject to a lien in favor of the attorney through whose services it was secured. *Yates*

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v. *Kinney*, 33 Neb. 853, 51 N. W. 230, 3 Am. & Eng. Ency. of Law (2nd ed.) p. 453. It follows from this that the lien duly acquired exists against the assignee of the judgment, the same as against the judgment creditor. *Cunningham v. McGrady*, 61 Tenn. 141; *Wetherby v. Weaver*, 51 Minn. 73, 52 N. W. 970; *Guliano v. Whitenack*, 24 Civ. Proc. Rep. (N. Y.) 55.

As appears in the special findings the appellee released all her right, title, and interest in the judgment; but this release can not operate to affect appellants' right to their lien on the judgment. *Bickford v. Ellis*, 50 Me. 121. The law which recognizes an attorney's right to a lien upon a judgment, to secure his fees for services rendered in its procurement, rests upon the equitable rule that the party who has reaped the benefit of his services should not be allowed to run away with the fruits of such services, without satisfying the legal demands of his attorney, by whose industry, sagacity, and learning, and in many cases at whose expense those fruits are obtained. 13 Ency. Pl. & Pr. 142. Per Kenyon, C. J., in *Read v. Dupper*, 6 T. R. 361; *In re Wilson*, 12 Fed. 235.

The judgment plaintiff could not by any act of his affect appellant's lien upon the judgment, and it follows that the act of his assignee in releasing her interest in the judgment could not affect their rights under the lien. Whether they can proceed to have execution issue, in an effort to enforce their lien, while the judgment stands upon the record, released, so far as the appellee's interest is concerned, is another question. It has been held that a motion to prosecute and vacate a satisfaction of a judgment should be made in the attorney's name, but that the suit should proceed in the client's name. *Murray v. Jibson*, 22 Hun 386; *Reynolds v. Reynolds*, 10 Neb. 574, 7 N. W. 322.

Under our statute, and the authorities, a notice of an attorney's lien upon the judgment duly acquired is notice to all the world. Such notice is therefore perfect against

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an assignee of a judgment, and no personal notice to the assignee is required. *Sexton v. Pike*, 13 Ark. 193; *Marvin v. Marvin*, 22 Civ. Proc. Rep. (N. Y.) 274; *Heartt v. Chipman*, 2 Aik. (Vt.) 162; *Alderman v. Nelson*, 111 Ind. 255.

Our conclusion is that by the assignment of the judgment by Eli W. Middleton to the appellee and by her subsequently releasing all her interest therein by an indorsement upon the margin of the judgment record, appellants' lien was neither destroyed nor affected, and that by reason thereof, under the facts found, appellee did not become personally liable to appellants.

The first specification of the assignment of errors is that the court erred in its special findings thirteen, fifteen, and sixteen, and also in overruling appellants' motion to strike out said findings. This is not a proper assignment of error, and does not present any question for decision. Judgment affirmed.

ON PETITION FOR REHEARING.

WILEY, C. J.—In their brief on petition for a rehearing, counsel complain bitterly of the statement in the original opinion that the only assignment of error that presents any question for review is the second, which challenges the conclusions of law. Upon a reëxamination of the record we feel fully justified in the statement thus made, in the abstract, but add that all questions properly presented by the record are embraced in the second specification of the assignment of error. The first specification of the assignment of errors is that the court erred in overruling appellant's motion to strike out special findings thirteen, fifteen, and sixteen. This was a written motion, and it was based upon the ground that the said findings were "inconsistent with the other findings returned". We insist that this motion, the overruling of which is assigned as error, does not present any question for review, even if the motion and the ruling thereon were brought into the record by a bill of exceptions, and this has

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not been done. As appellants' learned counsel insist that the motion is thus brought into the record, we deem it important to state the facts as disclosed by the record. While there is a bill of exceptions attached to the transcript, it will be readily seen from what follows that the bill is not in the record.

The record shows that the special findings were made January 23, 1899. On the same day appellants' motion to strike out findings thirteen, fifteen, and sixteen, was filed and overruled, and they were given sixty days in which to file their bill of exceptions. On the same day the court stated its conclusions of law, and appellants excepted thereto. Immediately following this, at the same sitting of the court, appellants moved for a new trial, which motion was overruled, and sixty days were given in which to file their bill of exceptions. On the same day appellants filed their general bill of exceptions, and a record entry thereof was made, which is shown by the transcript. This general bill of exceptions is not, however, copied into the record. The original bill of exceptions, embracing the motion to strike out findings thirteen, fifteen, and sixteen, and the ruling thereon, shows that it was presented to and signed by the trial judge January 27, 1899, and is attached to the transcript. It appears, therefore, that this special bill of exceptions was approved and signed by the trial judge within the time given, but there is nothing in the record by way of record entry or certificate of the clerk to show that such bill was ever filed, either in open court or in the clerk's office. This is essential to bring the bill into the record. Upon this proposition there are numerous authorities, but we content ourselves by referring to *Denman v. Warfield*, 20 Ind. App. 664, and authorities there cited, and *Lowry v. Downey*, 150 Ind. 364, and authorities there cited. Pretense may be made that the record entry made on January 23rd, showing the filing of the "general" bill of exceptions referred to, was in fact the special bill, embracing the

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motion to strike out. This position, however, is wholly untenable, for the reason that the record entry made January 23rd could not possibly refer to or embrace a bill of exceptions that was not then in existence and was not approved and signed until four days thereafter. True, the latter bill has indorsed and stamped upon its back a stencil file mark of the clerk, but this is not sufficient to show that it was filed as required by law. So we must hold that the motion to strike out is not in the record. But, even if it were, it would not present any question. It has repeatedly been held that a motion to strike out parts of a special finding is not authorized by any rule of practice. *Tewksbury v. Howard*, 138 Ind. 103; *Van Valkenburgh v. Dean*, 15 Ind. App. 693; *Sharp v. Malia*, 124 Ind. 407; *Levy v. Chittenden*, 120 Ind. 37.

In *Sharp v. Malia*, *supra*, the court said: "We are not advised of any rule of practice which authorizes a motion to strike out parts of a special finding of facts. Should the court fail to find all the facts proved, or find the facts contrary to the evidence, the remedy is by motion for a new trial."

As we have seen, appellants moved for a new trial, and in their brief on petition for rehearing it is earnestly urged that we should have considered the questions presented by it under the third specification of the assignment of error, whereby the action of the trial court in overruling the motion is challenged. A brief mention of the reasons for a new trial will serve to show that every question it is thus sought to raise is properly presented, and reviewable under the exceptions to the conclusions of law, which are assigned as error.

The reasons for a new trial are: (1) Error in the thirteenth, fifteenth, and sixteenth special findings, and each of them, in that they are inconsistent with the other findings; (2) error in the conclusions of law, and that the conclusions of law are not sustained by the findings and are contrary to

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law; (3) error in sustaining appellee's motion for judgment on the findings and conclusions of law; (4) error in overruling appellant's objections and exceptions to the conclusions of law, and in rendering judgment against them; (5) error in rendering judgment in favor of appellee. If any of these present any question that is not fairly debatable under the assignment of error questioning the conclusions of law, then we were in error in saying that the only question for consideration was thus presented. Appellee moved for judgment on the special findings and conclusions of law, which motion was sustained. The correctness of the conclusions of law can not be thus tested. *Royse v. Bourne*, 149 Ind. 187. This disposes of the third reason for a new trial.

The second, fourth, and fifth reasons for a new trial do not present any question that is not fully and fairly covered and embraced by the second specification of the assignment of error, which brings in review the conclusions of law. That certain of the special findings are inconsistent with other findings is not a reason for a new trial. The only manner in which a special finding of facts and conclusions of law can be brought in review is by excepting to the conclusions of law. *City of Logansport v. Wright*, 25 Ind. 512; *Peden v. King*, 30 Ind. 181; *Luirance v. Luriance*, 32 Ind. 198; *Board, etc., v. Newman*, 35 Ind. 10; *Cruzan v. Smith*, 41 Ind. 288; *Rose v. Duncan*, 43 Ind. 512.

The errors assigned are: (1) That the court erred in overruling the motion to strike out special findings thirteen, fifteen, and sixteen; (2) that the court erred in its conclusions of law; (3) that the court erred in overruling the motion for a new trial; (4) that the court erred in rendering judgment against appellants.

From this assignment of error, and the authorities to which we have referred, it is clear that the only error assigned that presents any question for review is that the court erred in its conclusions of law, and it follows that we

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were right in the original opinion in so stating. It is probably true that if facts specially found were inconsistent and contradictory, it might follow that they would not sustain the conclusions of law based thereon; but such condition does not here exist. Counsel urge that findings thirteen, fifteen, and sixteen are inconsistent with the other findings, but we are unable to discern any inconsistency. It is also insisted that we did not decide the case upon the theory made by the complaint. An examination of the original opinion and the complaint will disclose the fact that the opinion follows the theory of the complaint. The first paragraph of complaint proceeds upon the theory that appellee took an assignment of the judgment with knowledge of appellants' lien; that she received full payment thereof, including appellants' lien, and that the payment was made to her without the knowledge or consent of appellants. The second paragraph proceeds upon the theory that appellee expressly agreed to pay appellants' lien when she took an assignment of the judgment. Also that she released the judgment of record, and hence became liable, etc.

The court found every essential fact against appellants, and there can be no question but what on the facts found the conclusions of law were correctly stated. No other conclusion could have been reached.

Petition for a rehearing overruled.

TONER ET AL. v. CITIZENS' STATE BANK OF KEWANNA,
INDIANA.

[No. 3,078. Filed March 16, 1900. Rehearing denied June 5, 1900.]

WAREHOUSEMEN.—Receipts.—Transfer.—Negotiable Instruments.—Bailment.—A warehouse receipt transferred by mere delivery is not negotiable under §8722 Burns 1894, and the assignee takes the same subject to any defense existing at the time of the transfer or before notice thereof to the warehousemen.

From the Fulton Circuit Court. *Reversed.*

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A. D. Toner, I. Conner, J. Rowley and J. G. Williams,
for appellants.

Enoch Myers, G. W. Holman and R. C. Stephenson, for
appellee.

COMSTOCK, J.—The complaint in this cause was in four paragraphs. The first paragraph is as follows: "The plaintiff in the above entitled cause, complaining of the defendants, says that on August 31, 1887, the defendant, Joseph Murphy, deposited with his codefendants, A. D. Toner and Brunck, who were then, and now are, the owners, proprietors, and operators of what is known as the Kewanna Elevators, situated in Kewanna, Fulton county, 84 50-60 bushels of wheat, and took from said Toner and Brunck a receipt therefor as follows: No. 632. Kewanna Elevators. Kewanna, Ind., Aug. 31, 1887. Received of Joe Murphy, 84 50-60 bushels wheat in store, subject to our charges for insurance. Grade sixty. A. D. Toner and Brunck. By J. Mellette."

That said Murphy was on August 27, 1891, indebted to the plaintiff in the sum of \$550, for which he gave his note to the plaintiff, which sum, the interest, or any part thereof, has never been paid, and at the same time transferred to the plaintiff, by delivery thereof, said receipt as collateral security for the payment of said indebtedness. That it was agreed by and between said Toner and Brunck and said Murphy, at the time of said deposit, that there would be no storage charges whatever on said wheat, nor should there be any other charges to said Murphy on account of said deposit. That said storage receipt was transferred to the plaintiff herein by delivery only, hence said Murphy is made party defendant herein, and required to answer as to any interest he may claim herein. That prior to the beginning of this suit, to wit, on the 15th day of January, 1897, the plaintiff herein presented said receipt to said A. D. Toner and Brunck at their warehouse, and demanded return of said wheat, but that said bailees refused to deliver

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said wheat to the plaintiff. That upon said refusal the plaintiff herein demanded pay therefor at the market price, viz., eighty-five cents per bushel, which said bailees refused to pay. That said wheat was at that time worth the sum of eighty-five cents per bushel, or the gross sum of \$72.11 in the market at said town of Kewanna. Each of the other four paragraphs of the complaint is identical with the one just quoted, except a different wheat receipt is set out in each one. All of these receipts, however, are alike except as to date, quantity of wheat stated in them, and the grade of the wheat. In the second paragraph the receipt is dated September 27, 1890, calls for 53 50-60 bushels, and the grade is fifty-eight. In the third the receipt is dated December 4, 1890, calls for 132 30-100 bushels, and the grade is fifty-seven. In the fourth paragraph, the receipt is dated August 17, 1891, calls for 300 45-60 bushels, and the grade is sixty. Murphy was defaulted; the cause was put at issue as to Toner and Brunck, submitted to a jury, and a verdict returned on which judgment was rendered against all the appellants in favor of appellee for \$533.26.

The first and fifth specifications of the assignment of errors are discussed, it being admitted that the others present no available error. The first specification is that "the complaint does not state facts sufficient to constitute a cause of action against said appellants." The fifth is that the court erred in overruling the motion of appellants Toner and Brunck for a new trial.

Counsel for appellant claim that this complaint is for conversion, and that it is bad for the reasons (1) that it does not show ownership or interest of Murphy in the property for which the receipts were drawn; (2) that the instruments set out in the complaint are simply the acknowledgment of the receipt of property without any affirmative obligation; (3) that the delivery of the receipts without indorsement did not operate to transfer any of the wheat.

The complaint shows that appellants Toner and Brunck were warehousemen under §8720 Burns 1894, §6541 Hor-

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ner 1897. The receipts set out in the complaint comply substantially with the requirements of §8721 Burns 1894, §6542 Horner 1897. It is averred, however, that they were transferred by delivery. Such transfer not being by indorsement did not make them negotiable under the last named section. Still it was an equitable assignment of the interest of the bailor, and appellee took whatever rights they gave the depositor. There were more than the acknowledgment of the receipt of property. Each receipt was a contract of bailment, an agreement to store, to hold subject to the demand of the bailor, subject to the insurance charges therein provided for. The title of the bailor to the property could not be questioned by the bailee. The bailor transferred, in the course of business, the receipts as collateral security for the payment of a *bona fide* indebtedness created at the date of the transfer. The assignment being an equitable one, the assignor being made a party to answer to his interest in the property in question, the complaint is good so far as any objections are pointed out.

Three reasons set out in the motion for a new trial are discussed. The first and second reasons are based upon the ground that the damages assessed are excessive. These reasons were well founded. The receipts not being negotiable by the statute, §8721 Burns 1894, §6542 Horner 1897, appellee took them without prejudice to any defense or other set-off existing at the time of or before notice of the transfer to appellants. Appellants by way of set-off asked credit for an indebtedness due them from Murphy, before they had notice of the transfer of the receipts to appellee. The evidence clearly establishes that these items of credit claimed were for grain and flour furnished and for grinding done at the appellants' mill for and at the request of Murphy; credit was also claimed for insurance and storage. There was a conflict in the evidence as to whether Murphy was to pay storage, and the verdict of the jury is decisive of that question. There may, too, be some question as to the amount of the insurance, upon the evi-

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dence, but the written receipts provide for insurance, and, in the absence of fraud or mistake in their execution, they could not be contradicted by parol. The evidence, however, in reference to insurance, was withdrawn by the court from the consideration of the jury, without objection on the part of counsel for appellants, and as to that item of set-off no question is presented. There are other items of set-off for which it is manifest that appellants were entitled to credit, and for which it is equally manifest credit was not given in the calculations of the jury. Appellees were allowed the total value of the wheat with interest from the date of demand. From this amount appellants Toner and Brunck were entitled to have deducted the amount owing them from Murphy up to the time they received notice of the transfer of the receipts. As their claim will be the subject of proof upon another trial, we need only designate the character without specifying the items to which they are entitled to credit. The question presented by the third reason for a new trial may not arise upon another trial, and we do not consider it.

Judgment reversed, with instruction to sustain the motion for a new trial.

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[No. 8,089. Filed March 8, 1900. Rehearing denied June 6, 1900.]

TRESPASS.—Ejectment.—Master and Servant.—Landlord and Tenant.—Forcible Entry and Detainer.—Where plaintiff occupied a house and appurtenances as a part of the contract price for services to be performed by him as a farm hand, the relation of master and servant, and not that of landlord and tenant, existed, and when, for any cause, his contract of employment was ended, his rights in the premises ended, and an action could not be maintained by him against the owner of the premises for forcible ejection. *pp. 34-37.*

SAME.—Ejectment.—Master and Servant.—Landlord and Tenant.—Forcible Entry and Detainer.—Section 7118 Burns 1894, relative to forcible entry and detainer, is not applicable to a case where the relation between the landowner and occupant is that of master and servant. *pp. 37, 38.*

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From the Wells Circuit Court. *Affirmed.*

A. N. Martin and *W. H. Eichhorn*, for appellant.

J. S. Dailey, *A. Simmons* and *F. C. Dailey*, for appellee.

HENLEY, J.—The appellant was the plaintiff in the lower court. His complaint avers that under a contract with appellee he was put into possession of a certain dwelling-house, out buildings, dooryard, and garden appurtenant thereto, and was to have and hold possession of the same until February 27, 1898; that on the 1st day of July, 1897, while he and his wife and children were peaceably and lawfully residing on said premises pursuant to said contract, appellee unlawfully and forcibly entered said dwelling-house, and over his, appellant's, objection and protest, unlawfully and forcibly ejected appellant and his family from said premises, and unlawfully and forcibly took possession of said premises, and retains possession thereof; that appellee unlawfully and forcibly took possession of appellant's furniture, and removed the same from said dwelling-house, and placed it in the public highway,—all without the consent of appellant; that appellant was put to an expense of \$50 in finding another house in which to move; that he was damaged in the sum of \$100 by the loss of the said premises; that appellee damaged appellant's carpets and furniture in removing them from said dwelling-house; that appellant and his wife and children were greatly humiliated, and suffered great mental anguish by reason of acts of appellee aforesaid; that appellant was compelled to remove his chickens from said premises at a time when the weather was excessively warm, and by reason thereof said chickens were damaged; that, by reason of all of said acts of appellee, the appellant has been injured in the sum of \$500, and he asks judgment for said amount, and for a writ of restitution of said premises.

To appellant's complaint appellee filed an answer in five paragraphs. The fifth paragraph of answer, omitting the

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caption, was as follows: "And for fifth and further paragraph of answer to plaintiff's complaint, the defendant avers that the plaintiff was occupying said dwelling-house mentioned in the complaint and all the appurtenances thereto belonging, together with the dooryard and garden and truck patches mentioned in the complaint, as a farm-hand of this defendant; and that all of said possessions were held by him merely as a farm-hand, to better enable him to work on said farm as the farm-hand of this defendant, and all of said possessions were connected with the employment of said plaintiff by this defendant as a farm-hand, and were held as a part of his compensation for his labor upon said farm as a farm-hand of this defendant. And this defendant further avers that said possession of all of said premises mentioned in the complaint by the plaintiff was the possession by this defendant for the reason that it was held by the plaintiff as a part of his employment as a farm-hand, and was connected with his said employment. And the defendant further avers that in removing said furniture from said house reasonable care was used, and no damage was done said furniture; and the defendant further alleges that in removing the carpet from said floor reasonable care was used, and that said carpet was not torn or damaged by removing the same from said floor. Wherefore, the defendant says the plaintiff ought not to recover." Appellant's demurrer to this paragraph of answer was overruled. The cause was put at issue by appellant's reply; it was submitted to a jury for trial, and a general verdict returned in favor of appellee.

Appellant's sole contention is that the lower court erred in overruling the demurrer to the fifth paragraph of answer. Counsel for appellee insist that the fifth paragraph of answer presents a case where the relation created between the appellant and appellee was that of master and servant, and the rights appellant had under the contract were the rights of a servant only; that the relation of landlord and

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tenant never existed in this case; that the use of the house to live in and of the appurtenances thereunto belonging were mere incidents to the employment, and that the possession was at all times the possession of appellee, the master. If counsel are correct in their contention that the facts averred in the answer create the relation of master and servant between the appellee and appellant, the answer is sufficient, because, this being an action for damages for trespass, it would not lie, unless appellant had either possession, or the right of possession, and a servant who has neither could not maintain the action against the master who has both. Under the averments of the answer, appellant occupied the house and appurtenances as a part of the contract price for the services to be performed by him, and when for any cause his contract was ended, his rights in the premises end. See *Fulton v. Heffelfinger*, 23 Ind. App. 104. The question as to whether appellant was unlawfully discharged under his contract does not arise upon the demurrer to the answer. The case of *Bowman v. Bradley*, 151 Pa. St. 351, 17 L. R. A. 213, 24 Atl. 1062, decided by the supreme court of Pennsylvania, is in all respects like the case at bar. In that case, it was said: "The subject of this contract was labor. Labor was what Bradley needed and undertook to pay for. It was what Bowman undertook to furnish him at an agreed price. The labor was to be performed upon the land in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper, or a tenant paying rent, his possession of the land and the cows, and the implements of farm labor, was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborer. The house, the barn, the land, the cattle, the farming tools were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he rep-

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resented, and for whom he labored for hire. * * * The case seems to have been begun, and tried, by the plaintiff on the theory that his right to the possession of the house was superior to his right to remain in the defendant's service; and that while his employer might dismiss him from the one at any time, he could not oust him from the other until the expiration of one full year. Such a theory can not be sustained by proof of a contract for labor at a fixed price per day and a house to live in. It can only be supported by proof of a contract for one year's occupancy of the house. Both parties agree that the contract in this case was one of hiring. There is no pretense of a separate lease for the house. The compensation for its use was in the labor to be performed on the premises. When the labor ceased on the 19th of July, the plaintiff ceased to pay for his occupancy. * * * It is not necessary that occupancy of a house, or apartments, should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupancy is convenient for the purposes of the service and was obtained by reason of the contract of hiring." To the same effect, see *Kerrains v. People*, 60 N. Y. 221; *State v. Jewell*, 34 N. J. L. 259; *Haywood v. Miller*, 3 Hill 90; *Lightbody v. Truelsen*, 39 Minn. 310, 40 N. W. 67; *Fulton v. Heffelfinger*, 23 Ind. App. 104.

In the case of *Chatard, Bishop, v. O'Donovan*, 80 Ind. 20, the Supreme Court held that the relation existing between the bishop and a priest appointed by him was that of master and servant. That the possession of the parsonage and other real property occupied by the priest incident to his appointment was the possession of the bishop, who had power at any time to remove the servant, and install another in his place and in the possession of the property of the office. In such a case, the relation of landlord and tenant can not exist.

Section 7118 Burns 1894 is relied upon by appellant.

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This statute is not applicable in a case like this. In every case covered by the statute *possession* is contemplated. Whether that possession be lawful or unlawful, or however acquired, it does not matter, the section cited is applicable. It does not apply to a case where there is not, and cannot be, possession in the occupant. It cannot apply to a case like the one under consideration, where, by contract, the relation assumed between the landowner and the occupant is that of master and servant. Appellant had no possession. His possession was that of appellee, his employer. It could not survive the contract of hiring, to which it was incidental, and under which it was a part of the price for services to be performed by appellant. When appellant's contract was canceled, his right to occupy the premises terminated. As was said in *Bowman v. Bradley*, 151 Pa. St. 351: "His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school building; like that of the domestic servants to the rooms in which they lodge in the house of their employers."

The fifth paragraph of answer averred facts which amounted to a complete defense to the complaint. There was no error in overruling appellant's demurrer thereto. Judgment affirmed.

**BOWMAN, ADMINISTRATOR, ET AL. v. THE CITIZENS'
NATIONAL BANK ET AL.**

[No. 2,972. Filed Jan. 24, 1900. Rehearing denied June 7, 1900.]

DECEDENTS' ESTATES.—Executors and Administrators.—Claims.—Complaint.—Parties.—Available error cannot be predicated upon the action of the court in overruling a demurrer to an amended complaint filed by a claimant upon transfer of claim to the issue docket because of the failure of the complaint to name the administrator as a party, since the administrator became a party by operation of law. *p. 42.*

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PRINCIPAL AND SURETY.—*Bills and Notes.*—*Pleading.*—*Answer.*—An answer, in an action on a promissory note, pleading suretyship and seeking a discharge of surety because of the extension of time of payment, must state the contract, including the promise and consideration, in such manner that the court may determine from the facts whether it is such a contract as precludes the creditor from enforcing payment against the principal until a specified period has expired pp. 43, 44.

SAME.—*Executors and Administrators.*—*Claims.*—*Amended Complaint.*—*Cross-Complaint.*—*Process.*—*Jurisdiction.*—Where a claim against a decedent's estate was transferred to the issue docket, and amended by making another person bound with the decedent in the contract a defendant in the action, and such defendant appeared and filed a cross-complaint, setting up his suretyship for decedent, and the administrator appeared and demurred to the amended complaint and was present by attorneys at the trial, the court had jurisdiction of the administrator upon the cross-complaint, although no process was issued thereon. pp. 44-54.

From the Delaware Circuit Court. *Affirmed.*

R. S. Gregory, A. C. Silverburg, O. J. Lotz, F. Ellis and J. T. Walterhouse, for appellants.

C. G. Renner, J. C. McNutt and E. M. White, for appellees.

BLACK, J.—A claim was filed in the office of the clerk of the court below by the appellee The Citizens National Bank of Martinsville, Indiana, against the estate of George L. Lenon, deceased, upon a joint and several promissory note signed by the decedent and the appellant Richard Sedgwick and the appellee Charles A. Ramsey. The claim, upon the filing thereof, was docketed in the appearance docket. Afterward, the claim not having been allowed by the administrator, it was transferred and docketed in the issue docket as a case pending under the number 11,047. The title, or caption, of the statement of claim, as originally filed, was as follows: "State of Indiana, Delaware County, ss. Estate of George L. Lenon, deceased, in account with Citizens' National Bank of Martinsville, Indiana. Dr." In the statement, amongst other things, a credit was alleged by way of payment on the note by "B. C. Bowman, Adm. of estate of George L. Lenon," etc.

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The claimant filed in the court below a verified petition for leave to amend its claim by making said Sedgwick and Ramsey defendants. In this petition, it was alleged, amongst other things, that the action was one to collect a joint and several promissory note executed by George L. Lenon, in his lifetime, Richard Sedgwick and Charles A. Ramsey; that said note was the basis of the action; that it was due and unpaid; and that after the death of said Lenon, one Benjamin C. Bowman had been duly appointed administrator with the will annexed of his estate. The filing of the claim against the estate was alleged, and it was stated that it was not allowed by said administrator for the reason that Sedgwick and Ramsey were jointly liable, whereupon the claim was transferred to the issue docket, etc.

Thereupon, the court ordered that the "claim be and the same is hereby amended by making said Sedgwick and Charles A. Ramsey parties," etc., and the clerk was ordered to issue process against them. Thereupon, the claimant filed an amended complaint, wherein, amongst other things, it was alleged that the note was made payable to the order of "J. T. Cunningham, P't.," and that before it became due, he, for a valuable consideration, indorsed it to said bank by writing his name across the back, a copy of this indorsement and a copy of the note being set out; also, a copy of the credits indorsed upon the note, one of them purporting to be "by B. C. Bowman, Adm. Est. G. L. Lenon." Otherwise there was no reference to the administrator in the amended complaint, which did not mention the death of said Lenon. In the captions of the petition and the amended complaint, the defendants were named as George L. Lenon, Richard Sedgwick and Charles A. Ramsey. Thereafter, Bowman, administrator, filed his demurrer to the amended complaint for want of sufficient facts, stating in the title of the demurrer the names of the defendants as "George L. Lenon, Richard Sedgwick, et al." In the body of this demurrer, it was stated: "In case numbered 11,047, and entitled as above,

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Benjamin C. Bowman, administrator with the will annexed of the estate of George L. Lenon, deceased, separately and severally, as such administrator, demurs," etc. The court overruled this demurrer.

Later, the defendant Ramsey filed his answer in four paragraphs, and also filed his cross-complaint in three paragraphs against Bowman, administrator, Sedgwick, and the claimant, naming the defendants in the title of the answer as "Bowman et al." and in the title of the cross-complaint as "Benjamin C. Bowman, administrator, et al."

The defendant Sedgwick filed his separate answer to the amended complaint, setting out in the title of the answer, as the names of the defendants, the names of the three signers of the note. The claimant demurred to the third paragraph of the separate answer of Sedgwick, setting out in the title of the demurrer, as the names of the defendants, "Geo. L. Lenon, B. C. Bowman, Adm. et al." The court sustained this demurrer to the third paragraph of the answer of Sedgwick.

Afterward, the court entered a rule against the defendants Bowman, administrator, and Sedgwick to answer the cross-complaint of Ramsey. Upon failure of the administrator and Sedgwick to discharge the rules against them, to answer Ramsey's cross-complaint, the administrator and Sedgwick were called and defaulted, and the matter upon the cross-complaint was submitted to the court, and the court found in favor of Ramsey upon his cross-complaint and adjudged that he was only a surety of said George L. Lenon, deceased, on the note in suit, and that the property of the estate pay the note and be exhausted before levying upon the property of Ramsey.

Afterward, at the same term, the plaintiff and "the defendant" being present by their attorneys, there was a trial by the court, without a jury, and the court "having heard all the evidence and being fully advised in the premises" found for the plaintiff against the defendants, "Benjamin

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C. Bowman, administrator with the will annexed of the estate of George L. Lenon, deceased, Richard Sedgwick and Charles A. Ramsey, on the note sued on," etc.; and further found that said Ramsey executed the note sued on as surety only, etc., and final judgment was thereupon rendered, against the administrator as such and his codefendants, with an order for the enforcement of the judgment against the decedent's estate before levying on the property of Ramsey. This appeal is brought by Bowman, as administrator, and Sedgwick against the claimant and Ramsey.

On behalf of the administrator, Bowman, it is contended that the court erred in overruling his demurrer to the amended complaint, the objection to the pleading urged in argument being, in effect, that he was not named in the amended complaint, which was in the form of a complaint against the three makers of the note as if they were all in life.

The complaint certainly was defective in form; but upon the whole record before us we can not, upon such ground, treat the overruling of the administrator's demurrer to it as a reversible error. The proceeding was initiated against the estate by the filing of the claim and its entry on the appearance docket as required by the statute. When these things had been done the action was commenced. It was not necessary in the statement of the claim so filed and entered to name the administrator. He became a party by operation of law and was bound to take notice of the filing of the claim without summons or other notice. §§2473, 2474 Burns 1894, §§2318, 2319 Horner 1897; *Taggart v. Tevanny*, 1 Ind. App. 339. If the claim be not admitted by the administrator, it must be transferred to the issue docket for trial as other civil actions, and it is the duty of the administrator to make all available defenses. §§2474, 2477 Burns 1894, §§2319, 2322 Horner 1897.

In the petition to make additional parties, the granting of which made the occasion for the filing of the amended

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complaint, the appointment of the administrator was alleged, and the steps which had been taken in the proceeding upon the claim were recited. The administrator, as such, appeared, as was his duty, and defended in the trial court, and the final judgment was rendered, not against the deceased maker of the note, but against the administrator, as such. The various namings of the defendants, though technically wrong, produced no substantial detriment. See *Boyl's Adm. v. Simpson*, 23 Ind. 393; *Niblack v. Goodman*, 67 Ind. 174; *McConahey's Est. v. Foster*, 21 Ind. App. 416.

In the third paragraph of the answer of the defendant Sedgwick, to which the demurrer of the complainant, the bank, was sustained, it was alleged that Sedgwick executed the note in suit as surety only, and not otherwise, and received no part of the consideration therefor, and that the plaintiff, for a valuable consideration, and without the consent of said surety, extended and postponed for a definite time, the time of the maturity of said note while the holder thereof, and before the maturity thereof, to the principal thereof, and with full knowledge of the foregoing facts.

Upon the face of the note the three signers thereof were joint and several makers, without any indication of the suretyship of any of them. The answer of Sedgwick does not show for whom he was surety, or who received the consideration, or to which of the makers the extension of time was given. The pleading does not show by the averment of facts what consideration was given or promised for the extension of time. It is said that, before the maturity of the note, the time of its maturity was extended. If this is equivalent to a statement that the time of payment was extended beyond the maturity of the note, yet the period of extension, or the time to which payment was extended, is not stated. If the pleading shows that the plaintiff knew that Sedgwick was a surety, it does not show that the plaintiff knew who was Sedgwick's principal.

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The statement that the extension was given for a valuable consideration is a statement of a conclusion of law. The particular facts constituting the consideration should be stated in such a pleading, it being for the court to determine from the facts pleaded whether they constitute a consideration legally sufficient to support the promise. *Brush v. Raney*, 34 Ind. 416; *Leach v. Rhodes*, 49 Ind. 291; *Wheeler v. Hawkins*, 101 Ind. 486; *Marshall v. Aiken*, 25 Vt. 328; *Boyd v. Cochrane*, 18 Wash. 281, 51 Pac. 383.

It is alleged in the answer that the plaintiff extended and postponed, for a definite time, the time of the maturity of the note, but what facts effected such a result are not shown. What promise or agreement was made is not stated. If it was a promise in terms to extend "for a definite time," it would not have the effect of preventing the holder from suing, for any particular period; and unless the pleading state facts which would have such legal effect, it is insufficient. When a surety seeks his discharge because of extension of time of payment, he relies upon the existence of a collateral contract between his principal and his creditor, and he should state the contract, including the promise and the consideration, so that when the facts pleaded are considered by the court it may be regarded as such a contract as will release a surety, such a contract as precludes the creditor from enforcing payment against the principal until a specified period has expired. *Meniffee v. Clark*, 35 Ind. 304. There was no error in sustaining the demurrer to this paragraph of answer.

No question is presented relating to the form of the judgment, and no matter other than those disposed of above is before us affecting the recovery in favor of the bank against all the defendants.

In Ramsey's cross-complaint, he set up his suretyship for Lenon, the decedent, alone, and sought to have the assets of the estate in the hands of the administrator applied first upon the judgment, before resort to the property of the

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cross-complainant. It is claimed under proper assignments of error that the court did not have jurisdiction of the person of the administrator or of Sedgwick as to the cross-action and cross-complaint of Ramsey, because there was no process issued upon the cross-complaint, and neither of the appellants appeared to it. No judgment was rendered against Sedgwick upon the cross-complaint, but it was found thereunder that Ramsey was surety for Lenon alone, and the judgment by default in favor of Ramsey on his cross-complaint was that he was such surety and that the property of the decedent's estate be first exhausted before levying upon the property of Ramsey.

Our statute relating to decedents' estates provides that no action shall be brought against any executor or administrator and any other person or persons, upon any contract executed jointly, or jointly and severally, by the deceased and such other person or persons, but the holder of said contract shall enforce the collection thereof against the estate of the decedent only by filing his claim against the estate. Provision is also made by the statute whereby, if the claim be not admitted by the executor or administrator, it shall be transferred to the issue docket and shall stand for trial as other civil actions pending in the court. It is further provided that when any claim is transferred for trial, it shall not be necessary for the executor or administrator to plead any matter by way of answer, except a set-off or counterclaim, to which the plaintiff shall reply; but if the executor or administrator plead any other matter by way of defense, the claimant shall reply thereto; and if it be shown to the court that any person is bound with the decedent in any contract which is the foundation of the claim, the court shall direct that the claim be amended by making such person a defendant in the action, and process shall be issued against and served upon him, and thereafter the action shall be prosecuted against him as a codefendant with the executor or administrator, and judgment shall be rendered accord-

ingly. §§2466, 2474, 2479 Burns 1894, §§2311, 2319, 2324 Horner 1897.

In our code of civil procedure, it is provided, that when an action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the other, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issues made by the parties, at the trial of the cause, or at any time before or after trial, or at a subsequent term; but such proceeding shall not affect the proceedings of the plaintiff; and if the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution, first, upon and exhaust the property of the principal, before a levy shall be made upon the property of the surety; and the clerk shall indorse a memorandum of the order on the execution. §§1226, 1227 Burns 1894, §§1212, 1213 Horner 1897.

The statute providing for the determination of the question of suretyship does not deprive the surety of his rights, as such, existing at common law and in equity; and if the question is not determined by judgment in the manner provided for in the statute, it may be subsequently determined and the proper remedy may be obtained, as between the defendants, by proper proceedings. The statutory method of determining the question of suretyship is only exclusive in cases where the surety seeks to avail himself of a purely statutory remedy. *Gipson v. Ogden*, 100 Ind. 20; *Montgomery v. Vickery*, 110 Ind. 211; *Douch v. Bliss*, 80 Ind. 316; *Bliss v. Douch*, 110 Ind. 296.

In *Leaman v. Sample*, 91 Ind. 236, it was held that where one of two sureties made an issue that he was surety, and judgment went for him on that issue, there being no issue between him and his co-surety, this did not conclude his co-surety as to whose suretyship there had been no adjudication, who afterward paid the judgment and sued to compel contribution. See *Gipson v. Ogden*, 100 Ind. 20, 25.

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It was not adjudged in the case before us that Ramsey was a surety for Sedgwick, nor was the question whether or not Sedgwick was surety for Lenon determined in the cause, nor was there any judgment or order against him of which he appears to have reason to complain.

The question presented as between the administrator and Ramsey is not free from difficulty, and we have not been aided by any argument on behalf of Ramsey.

Until the question of suretyship is judicially determined, defendants in a judgment will be deemed primarily liable thereon. *Montgomery v. Vickery*, 110 Ind. 211; *Knopf v. Morel*, 111 Ind. 570, 573; *Voss v. Lewis*, 126 Ind. 155, 157.

In *Knopf v. Morel*, 111 Ind. 570, the judgment on the note had been taken against all the defendants, upon default, and the question of suretyship was not in issue. It was said by the court, that jurisdiction of the complaint of the plaintiff does not in itself authorize an adjudication upon the rights of the defendants among themselves; that jurisdiction to determine the rights of the plaintiff as against the defendants is not jurisdiction to determine the rights of the defendants on the question of suretyship; that the question of suretyship so far as it affects the rights of the debtors as between themselves is an independent one, and is not, as a general rule, determinable upon the complaint of the plaintiff.

In *Joyce v. Whitney*, 57 Ind. 550, the codefendants of the defendant, who by his cross-complaint pleaded suretyship, had been defaulted before the filing of the cross-complaint. It was said by the court that the complaint of the surety in such a case is a new and original proceeding, independent of the proceeding of the plaintiff. It was further said: "If the other defendants are present in court, in person or by attorney, at the time of the filing of the surety's complaint, and have actual knowledge thereof, then such complaint might be 'tried and determined,' if the parties were ready, with the original action."

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In *Pattison v. Vaughan*, 40 Ind. 253, it was held that as to matters contained in the original complaint, if not in all cases, the defendant to the original complaint, when served with process thereon, must be regarded as in court for all the purposes of the action, whether the matter in controversy arise upon the original complaint or upon the answer or cross-complaint; and no further process is necessary even against a defendant already defaulted.

It was said in *Bevier v. Kahn*, 111 Ind. 200, 202, that there is no real conflict between the decision in *Pattison v. Vaughan*, *supra*, and that in *Joyce v. Whitney*, *supra*, although there may be some in the language employed in expressing the opinions. See, also, *Jenkins v. Newman*, 122 Ind. 99, 102.

In *State v. Ennis*, 74 Ind. 17, the codefendant of the cross-complainant was defaulted upon the complaint of the plaintiff as well as upon the cross-complaint, and made no appearance in the action at any stage thereof.

So, in *Swift v. Brumfield*, 76 Ind. 472, the codefendant of the cross-complainant had been defaulted upon the plaintiff's complaint before the filing of the cross-complaint, on which he also was defaulted, which default upon the cross-complaint he moved to set aside. See, also, *Baldwin v. Webster*, 68 Ind. 133.

Lewis v. Bortsfeld, 75 Ind. 390, was an action for partition in which one of the defendants filed a cross-complaint for partition of her undivided part of the real estate. In the opinion, delivered by the judge who announced the opinion in *Joyce v. Whitney*, *supra*, speaking of a codefendant who appeared fully in the action both before and after the filing of the cross-complaint, the court said that he was bound to take notice of the cross-complaint without the issue and service of process thereon, and the fact that he made no appearance to the cross-complaint could not avail him on appeal. The court stated a rule as follows: "It is only where one of two or more defendants, after personal service,

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makes default in the original action, and another defendant files a cross-complaint, setting up new matter not apparent on the face of the original complaint, that the defaulting defendant must be served with process issued on such cross-complaint, before any judgment by default can be taken or rendered against him on such cross-complaint." This quoted language is approved in *Jenkins v. Newman*, 122 Ind. 99, 102, 103.

In *Voss v. Lewis*, 126 Ind. 155, one of the defendants in an action on a note filed a cross-complaint against his codefendants and the plaintiff, alleging therein that the cross-complainant was surety for all his codefendants, and on the same day all the defendants filed a joint answer to the complaint, and at the same time a rule was entered against the plaintiffs to reply to said joint answer, and a rule was entered against the defendants other than the cross-complainant to answer the cross-complaint. No further entries were made relating to the cross-complaint until the final hearing, when a finding and decree were entered declaring the cross-complainant to be a surety for his codefendants. No process was issued on the cross-complaint. The cross-complaint was filed by an attorney who represented all the defendants. It was held that as this attorney could not, as to the cross-bill, represent both parties thereto, and did not appear for the defendants thereto, as such, they were not represented in court. It was therefore held that, the attempted adjudication of the question of suretyship upon the cross-complaint having been made without the issuing and service of process thereon and without the appearance of the defendants named therein, it was void. Referring to *Lewis v. Bortsfeld*, 75 Ind. 390, it was said to be distinguishable from the case then at bar, where an entirely new element was introduced, having no reference to the controversy growing out of the matters alleged in the complaint; and it was said to be the general rule that in such

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a cross-bill setting up the question of suretyship the defendants thereto must be brought into court by process, unless they voluntarily appear. The court stated that in the case before it there was no need to stop to inquire whether the general rule was stated too strongly in *Lewis v. Bortsfeld, supra*. We do not find that the rule stated in *Lewis v. Bortsfeld* has been overruled.

In *Newton v. Pence*, 10 Ind. App. 672, it was held that there was no appearance by the codefendant of the cross-complainant, either to the original action or to the cross-complaint.

Johnson v. Meier, 62 Ind. 98, was an action on a promissory note purporting on its face to be the joint note of three makers, two of whom with the administratrix of the third were defendants. The administratrix separately answered by denial; the other two defendants joined in a complaint against the administratrix setting up their suretyship for the decedent. On trial, there was a finding for the plaintiff against the defendants, and a finding that the two defendants who had pleaded suretyship were sureties. It was held that in the proceeding authorized by the code, between the sureties and the administrator of the principal, no judgment could or ought to be rendered which could affect in any manner the proceedings of the plaintiff in his suit upon the contract either before or after final judgment; and that a final order in effect that all the assets of the property of the decedent's estate be first exhausted before levy on the property of the sureties was in direct conflict with the statute, which provides that the proceedings upon the question of suretyship shall not affect the proceedings of the plaintiff; and that it would have been error to order that the judgment be levied on the assets of the estate in the hands of the administratrix.

In *Hayes v. Hayes*, 64 Ind. 243, an action against one of two makers of a joint and several note, it was held not error to sustain a demurrer to an answer in the nature of a

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complaint setting up that the defendant was surety for the other maker who was deceased, and that the note had been allowed as a claim against his estate, which was solvent, and asking that the administrator be made a party and for process against him, and that before execution be levied on the defendants' property the estate of the decedent be first exhausted.

In *Knode v. Baldridge*, 73 Ind. 54, it was held that it would have been error for the court to make an order in favor of sureties directing a levy upon the property of their principal in the hands of a receiver and the sale thereof before seizing the property of the sureties, the property in the hands of the receiver being in the custody of the court, held not for the benefit of a particular creditor, but for the benefit of all. It was said: "Our statute, providing for the levy and sale of a principal's property before resorting to that of the surety, has no application at all to a case where the principal's property is in the control and custody of the court."

In *Williams v. Fleenor*, 77 Ind. 36, it was held that the complaint under the statute to determine the question of suretyship between codefendants is not a cross-complaint; that while the complaint of the party claiming to be a surety is filed in the principal action, the proceedings and the trial to be had upon it may constitute essentially an independent and separate action; that the statutory action upon such complaint is special, in that the complaint must be filed in a pending principal case; yet once the complaint has been filed, there is in the proceedings nothing peculiar or specially different from an ordinary civil action; that summons must be issued and served, unless waived, issues may be formed, and a jury trial had, in all respects as in an ordinary action under the code. It was said that the principal purpose and benefit of the procedure, in a legal sense, and often in practical results, is to settle the question of suretyship only; and that the order concerning the levy of

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the execution may be useless in some cases, and in any case is only an incident consequent on the determination of the issues, if found in favor of the alleged surety. See *Griffith v. Dickerman*, 123 Ind. 247.

The issue of suretyship between codefendants may be tried at, before, or after the trial of the principal cause, or even at a subsequent term. *Dodge v. Dunham*, 41 Ind. 186.

The statute relating to claims against the estates of decedents, as we have seen, provides that while an action cannot be originated by complaint and summons against the administrator and other persons upon a contract executed by the deceased and such other persons, but the holder, to enforce collection against the estate, must file the claim against the estate; yet when the claim has been transferred to the issue docket and amended by making another person, bound with the decedent in the contract, a defendant in the action and such defendant has been brought into court, "thereafter the action shall be prosecuted against him as a codefendant with such executor or administrator, and judgment shall be rendered accordingly."

It seems to us not improper in such case for such a codefendant to set up his suretyship and to cause the question thereon to be adjudicated, though he can not properly have an order for the seizure of the assets of the estate upon execution, or any order which will prevent the regular settlement of the estate and the proper distribution of the funds which may come to the administrator through orderly administration of his trust under the control of the court. An adjudication of such question may as well be had in the action wherein all the parties are thus before the court, and if had, the court can not be regarded as not having jurisdiction of the subject-matter.

The question before us for decision is whether or not the court had jurisdiction of the person of the administrator. If it had such jurisdiction, though it committed errors not properly saved and presented on appeal, the judgment must

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stand. The administrator was bound to defend against the claim, and he appeared and did defend. After the court had ordered that the claim be amended by making Sedgwick and Ramsey defendants, and the amended complaint had been filed, the administrator demurred to the amended complaint. He was present by his attorneys at the trial, when the court heard the evidence and, as shown by the record, made a finding upon the question of suretyship, to which finding no objection appears to have been made in any form.

It was the administrator's duty to appear in the action on the claim against the estate on all proper occasions for the making of defense. In accordance with the statute, he had been made a codefendant with others who with his decedent had made the joint and several note, and he was bound to know that under the statute the action would thereafter be prosecuted against the additional defendants as codefendants with him. Either of these codefendants had the right to have the question as to his suretyship adjudicated, but he could pursue his statutory right in this regard only by filing a complaint in the pending cause, and the action to determine the matter of suretyship was to that extent necessarily connected with the pending cause. The action on the complaint of the claimant and the action on the cross-complaint are so related that the administrator has assumed, not improperly, to bring the proceedings under both for review in one appeal.

If the action after the additional defendants were brought in should be regarded as an ordinary civil action against the administrator and his codefendants, as in a case where a defendant has died pending the action and the administrator of his estate has been substituted, or as in a case under the former practice when it was allowable to institute the proceeding originally by complaint and summons against an administrator and others bound with the decedent by contract, then the administrator having appeared and having

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demurred to the complaint against him and the other defendants, we think that under the rule as stated in *Lewis v. Bortsfield*, 75 Ind. 390, it would not be improper for the court to enter a rule against him to answer the cross-complaint, and to enforce the rule against him as in other civil actions.

If it be considered that the cross-complaint, being a complaint properly filed in the pending suit on the note, and necessarily filed therein in order to secure a statutory privilege, was so intimately connected with the proceeding on the claim against the estate that the provision of the statute relieving the administrator from the need of pleading any matter by way of answer, except a set-off or a counterclaim, should be so far extended as to relieve him from the necessity of pleading to the cross-complaint, and that therefore the rule against him to answer it was erroneous, yet when we have regard to the statutory duty of the administrator to appear without summons and to make all available defenses to claims, and we see him appearing to the complaint against him and his codefendants and upon the trial, we think it can not be said that the court did not have jurisdiction of the person of the administrator upon the cross-complaint, or that by merely abstaining from answering, though rightfully, he deprived the court of such jurisdiction.

If we can not say that the record does not disclose errors, yet we do not find any which the appellants can make available on appeal.

Judgment affirmed.

LAUER v. SCHMIDT.

[No. 2,993. Filed Feb. 2, 1900. Rehearing denied June 7, 1900.]

BREACH OF MARRIAGE PROMISE.—Evidence.—The testimony of plaintiff in an action for a breach of marriage promise that defendant asked her to marry him, that she consented, that he asked her to go to his home and get it ready for the marriage, and that the day for

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the marriage was fixed, was sufficient to justify the jury, if they believed the testimony to be true, in finding that there was an unconditional promise and agreement to marry. *p. 55.*

BREACH OF MARRIAGE PROMISE.—Excessive Damages.—A judgment for breach of marriage promise will not be reversed as excessive unless the amount assessed clearly appears to have been the result of prejudice, partiality, or corruption. *pp. 55, 56.*

From the Vanderburgh Superior Court. *Affirmed.*

John Brownlee and L. J. Herman, for appellant.

F. B. Posey and D. Q. Chappell, for appellee.

HENLEY, J.—This was an action commenced by appellee against appellant to recover damages for the breach of a marriage contract. The appellant answered by the general denial. A trial by jury resulted in a verdict for appellee, assessing her damages at \$1,400. Appellant's motion for a new trial was overruled, and judgment rendered for the amount of the verdict. The sufficiency of the pleadings is in no way questioned. It is insisted by counsel for appellant that the lower court erred in overruling the motion for a new trial; first, because there is no evidence that the appellant made an unconditional promise to marry appellee, and second, that the damages are excessive. Conceding that a promise to marry must be unconditional before an action for its breach can be maintained, we think the evidence in this case is such as would justify the jury, if they believed the witnesses were truthful, in finding that there was an unconditional promise and agreement to marry. Appellee testified that appellant asked her to marry him; that she consented; that he asked her to go to his house and get it ready for the marriage, and that the day for the marriage was fixed. The jury seem to have taken the testimony of appellee as true. A careful reading of the evidence in this cause would lead any one who was unacquainted with the parties, the witnesses, and the surrounding circumstances to the conclusion that the damages assessed were excessive, but the evidence is not of such a character as would take

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- this cause out of the operation of the established rule of this court, that judgment will not be reversed on account of the amount of damages assessed in cases of this class, unless the amount assessed clearly appears to have been the result of prejudice, partiality, or corruption. We find no reversible error. Judgment affirmed.
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TARPLEE v. CAPP, ADMINISTRATOR.

[No. 8,227. Filed Feb. 14, 1900. Rehearing denied June 7, 1900.]

EXECUTORS AND ADMINISTRATORS.—Decedents' Estates.—Insolvent Estates.—Claims Paid by Mistake.—Recovery by Administrator.—

Where an executor, acting under a misapprehension of the condition of the estate, and believing the same to be solvent, paid a general creditor in full, and it afterward developed that the estate was insolvent, an action may be maintained against the creditor to recover back the overpayment. *pp. 59-61.*

SAME.—Decedents' Estates.—Insolvent Estates.—Claims Paid by Mistake.—Recovery.—Complaint.—A complaint against a creditor by the administrator of a decedent's estate to recover a certain per cent. of the amount paid the creditor on the belief that the estate was solvent is not bad for failing to allege that a final dividend had been ascertained and declared by the court in which the estate was pending for settlement, where it was alleged that all of the assets of the estate had been reduced to cash, stating the amount of assets and liabilities, the per cent. the estate would pay and the overpayment to defendant. *p. 61.*

SAME.—Decedents' Estates.—Insolvent Estates.—Claims.—Recovery.—Pleading.—An answer in an action by an administrator to recover a portion of a claim paid a creditor under the mistaken belief that the estate was solvent, to the effect that the assets of the estate within the year after the granting of letters testamentary, and at the time defendant's claim was allowed and paid, exceeded the aggregate amount of claims filed and allowed, and that claims were afterward wrongfully and illegally allowed which rendered the estate insolvent, does not constitute a defense to such action. *pp. 61-70.*

From the Shelby Circuit Court. *Affirmed.*

B. F. Bennett, T. E. Davidson. D. A. Myers, T. B. Adams and Isaac Carter, for appellant.

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B. L. Smith, C. Cambern, D. L. Smith, K. M. Hord and E. K. Adams, for appellee.

WILEY, C. J.—This was an action by appellee as administrator *de bonis non* of the estate of James W. Anderson deceased, against appellant, to recover an overpayment made to him by a former executor in the belief that the estate was solvent. The case was put at issue, tried by the court, a special finding of facts made, and conclusions of law stated thereon favorable to appellee. Final judgment was rendered accordingly. Appellant's motion for a new trial was overruled, and he has assigned errors as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action, and (2) that the court erred in overruling the demurrer to the complaint; (3, 4, and 5) that the court erred in sustaining appellee's demurrer to the second, third, and fourth paragraphs of answer; (6 and 7) that the court erred in its conclusions of law, and in each conclusion of law; (8) that the court erred in overruling appellant's motion for a new trial. To pass upon the first question presented, it will be necessary to state the material averments of the complaint, which are as follows: That on November 29, 1892, James W. Anderson died testate; that Samuel B. Anderson and William H. Winship were appointed executors, and qualified as such; that, by agreement between the executors, the said Samuel B. Anderson assumed the entire management of the trust; that there came into his hands as assets of the estate from all sources \$74,901.77; that he paid preferred claims to the amount of \$23,429.27; that he paid unpreferred claims in the sum of \$49,322.70, \$33,570.99 of which was paid in full, and \$16,151.71 partial payments; that said unpreferred claims so paid in full were paid in the belief on the part of said Samuel B. Anderson that the estate was solvent, and that the assets would be largely in excess of the liabilities and cost of administration; that, in addition to the assets so

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received, the decedent left real estate in Rush and Decatur counties, Indiana, of the probable value of \$73,965; claim, \$15,000 secured by second mortgage on 1,300 acres of land in Missouri; that at the time of the payment of said unsecured claims the indebtedness of the estate had not been fully ascertained, but, as far as learned by said executor, did not exceed \$75,000; that the lands depreciated in value, and were sold for \$61,965; that owing to the depreciation of the land in Missouri there was a loss to the estate on the claim secured by second mortgage of \$13,800; that on March 29, 1895, the executors filed their final report and resignation, and appellee was appointed administrator *de bonis non*; that as such administrator he has converted the assets into cash, and sold all the real estate, amounting to \$71,428.38; that he has paid expenses of administration, including attorney's fees and for services of executors, in the sum of \$10,727.73; that he has paid preferred claims, \$23,818.78; that the total unpreferred claims against the estate amounted to \$110,952.99; that the total assets received by the executors and appellee, after paying preferred claims and expenses of administration, amount to \$85,988.56, and that said assets properly applied in discharge of the general claims would pay seventy-seven and one-half per cent. on each claim; that on January 10, 1894, Samuel B. Anderson, as executor, paid appellant \$120 interest on two \$1,000 notes, and on February 13, 1895, he paid the principal and accrued interest, \$2,132.30, being the full amount due thereon; that each of said payments was made out of the assets of said estate, and when made the executor and appellant believed said estate to be solvent, with assets more than sufficient to pay all debts and expenses of administration; that it has since been ascertained that the estate is insolvent, and that an order and judgment of the Rush Circuit Court, wherein said estate is pending, was made and entered, and declared said estate insolvent, and ordered that it be settled as such; that a dividend was ordered to be paid

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on the general claims of seventy-seven and one-half per cent. It is also charged that a demand was made on appellant for repayment of the amount so paid to him in excess of seventy-seven and one-half per cent., which was refused.

The first objection urged to the complaint is that the appellee, as administrator *de bonis non*, has no right to bring and maintain this action. While there is some conflict in the adjudicated cases, we are inclined to the view that the weight of the authorities and sound reason support appellee's right to maintain the action. In Thornton & Blackledge on Administration and Settlement of Estates, §169, p. 453, the rule is stated to the effect that where an administrator pays to a creditor of the estate the full amount of his claim, believing the estate is solvent, and it turns out that it is insolvent, such administrator may recover back the excess in amount paid, if such claim is not a preferred one. In *East v. Ferguson*, 59 Ind. 169, it was held that, where a settlement was made with a creditor of an estate and his claim allowed in full, upon a mutual mistake that the estate was solvent, and the claim is not a preferred one, such facts will constitute such a mistake as will be relieved against, and an action will lie to recover the excess. In *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161, it was held that where an executor, under the honest belief that the estate was solvent, pays a creditor in excess of his *pro rata* distributive share, he may recover back the overpayment in an action for money had and received for the use of the estate. It was also held in that case that it could make no difference to the defendant whether the plaintiff sued in his representative capacity, or in his individual name. It has been held that where an administrator of a deceased member of a firm, relying upon statements contained in the reports and inventory of the surviving partner of his decedent, paid to one of the heirs and distributees of the estate represented by the administrator a sum in excess of the amount she was entitled to receive, by reason of a depreciation in the value

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of the estate of the deceased partner, the administrator was entitled to recover from such heir and distributee the excess, whether the money was paid to her at her request, or was voluntarily paid to her without request, the money having been paid under a mistake of fact, and not under a mistake of law. *Stokes v. Goodykoontz*, 126 Ind. 535. The court, by Elliott, J., said: "The money paid by the administrator was paid under a mistake of fact, and not under a mistake of law. The facts which induced the administrator to pay the money * * * were presented to him in a lawful mode, and he had a right to rely upon them."

In Henry's Probate Law, §333, it is said: "As a rule an overpayment to a creditor made by an administrator or an executor may be recovered. It being inferred that he only intended to make such payment as the estate could afford and not to subject himself to personal liability on account of a deficiency of assets. This is, however, contrary to the common law rule. But it is probably essential to the recovery that such payment has been made under the impression that the estate was solvent." *Smith v. Smith*, 76 Ind. 236, is in point. In that case, the executors paid to appellant, who was a legatee under the will of the decedent, a certain amount of money and specific property. No account had been taken of the claim of the widow to her statutory allowance of \$500, and it turned out that after the distribution to appellant (the residuary legatee) there was not left sufficient assets with which to pay the widow's claim for \$500. Referring to the rule and the authorities in support of it, that, ordinarily, the payment of a demand, without compulsion and without fraud and with a full opportunity of obtaining such knowledge, can not be recovered back, the court, by Bicknell, C. C., said: "But such a rule is not applicable to legacies, or to money paid upon distribution by an executor. A legatee or a distributee may be required to give a bond, conditioned to refund his ratable proportion of the estate, if necessary. Decedent's Act,

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§§120, 140. And the failure of the executor to take out such a bond will not release the legatee or distributee from his liability to refund, when necessary, for the payment of debts, legacies or claims." The following cases are also in point: *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; *Walker v. Hill*, 17 Mass. 380; *Alexander v. Fisher*, 18 Ala. 374; *Rogers v. Weaver*, 5 Ohio 536; *Wheadon v. Olds*, 20 Wend. 174; *Barnett v. Vanmeter*, 7 Ind. App. 45.

It is also urged that the complaint is bad because it does not allege that a final dividend had been ascertained and declared by the court in which the estate was pending for settlement. We do not think this objection is well taken. It is alleged that all the assets of the estate had been reduced to cash; that there was in the hands of appellee \$84,988.56 to be applied on the general debts; that the claims filed amounted to \$110,952.99, and that the estate could only pay seventy-seven and one-half per cent. on the dollar on the general claims. It is also stated on this basis what the overpayment to appellant was. These averments are sufficiently definite to obviate the objection to the complaint under consideration. We are satisfied from the authorities, and upon sound reason, that the complaint states a cause of action, and that the court correctly overruled the demurrer to it.

Next in the order of discussion appellant urges that the court erred in sustaining the demurrer to the second, third and fourth paragraphs of his answer. The substantial averments of the first paragraph of answer are that the note which appellant held against the decedent, and which was paid by the executor, was justly due and owing to appellant; that it was paid within the first year after the granting of letters testamentary and notice thereof; that the aggregate amount of claims filed against the estate within a year after the granting of letters was \$16,000; that the assets of the estate were more than sufficient to discharge all of said

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claims, together with the costs of administration, etc., including appellant's note, and that when said note was so paid the assets of the estate were more than sufficient fully to pay and discharge all claims which were filed against the estate within one year after the notice of the appointment of the executors and all preferred claims and costs of administration.

The third paragraph is substantially like the second, but contains the additional averment that the aggregate amount of unpreferred claims allowed against the estate, after the expiration of one year after the granting of letters testamentary and notice thereof, was \$47,000,—\$40,000 of which was not filed for more than two years after letters were granted, and for more than fifteen months after appellant's claim was paid. The fourth paragraph in addition to averring that appellant's claim was just, and due when it was paid, avers that claims aggregating \$40,000 have been wrongfully and illegally allowed against the estate by the administrator *de bonis non* and his predecessor, Samuel B. Anderson, one of the executors of the will, and but for such wrongful and illegal allowances, the estate would be solvent.

Appellant has not called our attention to any authority in support of either paragraph of his answer, and we are unable to see upon what theory they can be held good. The creditors of the estate were not required by law to file their claims within one year after the granting of letters testamentary and notice thereof. The law does not fix any time within which an estate shall be finally settled, though it is certainly the policy of the law that settlement should be made as speedily as possible, and as the nature of the estate will permit. The administrator of an estate is bound to take notice of all claims, if filed within thirty days before final settlement. *Schrichte v. Stites*, 127 Ind. 472, and cases there cited.

The second and third paragraphs of answer, which charge the aggregate amount of claims filed within the year to be

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only \$16,000, and that the assets of the estate at the time were more than sufficient to discharge all of said claims, etc., do not present any issuable facts, for, as we have seen, claimants may file their claims after the expiration of the year, but in such event they are liable for costs. The facts charged in the fourth paragraph do not constitute any defense, while it does charge wrongful and illegal acts against appellant as administrator, and Samuel B. Anderson as executor, which might render them liable both personally and upon their bonds, in favor of any person interested, yet the facts charged do not constitute any defense in this action. The court correctly sustained the demurrer to each of these paragraphs of answer.

The case was tried by the court, a special finding of facts made, and conclusions of law stated thereon. As a conclusion of law, the court stated that appellee was entitled to recover of appellant \$569.70, for which judgment was rendered. At the proper time, the appellant excepted to the conclusions of law, and this is the next question discussed by counsel. An intelligent discussion of the question necessitates a reference to and statement of the facts specially found. The court found that the decedent died testate November 29, 1892; that Samuel B. Anderson and William H. Winship were named in the will as executors; that they gave bond and qualified as such; that, by agreement between the executors, the entire business of the trust was assumed and transacted by Samuel B. Anderson, who was a son of the decedent. It was further found that certain provisions were made in the will for the widow of decedent; and that she accepted such provisions; that at his death the testator held two policies of insurance on his life, one for \$10,000, payable to his widow, and one for \$11,156.25, payable to the widow and her children; that the aggregate sum of both of said policies was paid to the beneficiaries therein named, and that the interest of the children was assigned to the widow, and she received the entire amount; that at the time

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of the decedent's death, he was indebted to appellant upon two notes of \$1,000 each; that January 10, 1894, Samuel B. Anderson, as executor, paid appellant on said notes, out of the assets of the estate, \$120, and on the same day said debt was renewed, at the request of appellant, by said Samuel B. Anderson signing his name and that of his co-executor to a note for \$2,000; that on February 13, 1895, Samuel B. Anderson, as executor, paid said last note and interest, amounting to \$2,132.30; that appellant never filed said notes, or either of them, in the clerk's office, as a claim against said estate; that at the time of the decedent's death, the assets of his estate consisted of \$11,000 in personal chattels; wheat \$8,500; thirty-five acres of land in Decatur county worth \$3,183; 2,500 acres of land in Rush county, worth \$125,000; 1,320 acres of land in Missouri, worth \$26,400; 480 acres of land in Missouri, worth \$2,400; eighty acres of land in Tipton county, Indiana, worth \$2,700; 160 acres of land in Iowa, worth \$1,600; the Grand Hotel property in Rushville, worth \$8,000; and other property in Rushville, worth \$400; that there was a first lien on the Missouri land of \$10,000, making the total value of the estate at the time of the death of the decedent \$179,183; that up to the time appellant's note was paid, the amount of claims filed against the estate in the clerk's office did not exceed \$15,000; that the total amount of claims, both preferred and general, that had then come to the knowledge of the executors did not exceed \$85,000; that said executor, Samuel B. Anderson, had used diligence in trying to ascertain the amount of the indebtedness and assets of the estate; that when appellant's note was paid, the said Samuel B. Anderson and the widow believed said estate was solvent, and that said payment was made by said Samuel B. Anderson in good faith, he supposing the estate to be amply solvent; that, prior to February 3, 1893, said executor borrowed of the said widow all of said insurance money, in the belief that the estate was solvent, and was paid out by him on the *bona fide* debts of the estate; that when said payment

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was made to appellant, he, appellant, believed the estate was solvent; that there came to the hands of Samuel B. Anderson, as executor, from all sources, the sum of \$74,901.77, less \$1,950, which consisted of a note given as part of the purchase money for the Tipton county lands, which he turned over to appellee, which left the true amount of assets which came into the hands of Samuel B. Anderson \$72,951.77; that of said sum he paid on preferred claims \$23,429.07; that he paid on general claims \$49,322.70; that \$33,570.99 of the latter amount was paid on general claims in full, and \$16,151.71 was applied as partial payments on general claims; that all of the above general debts were paid during the first year of the trust, after the appointment of the executors, and up to that time the indebtedness of the estate had not been ascertained, but it was believed by the executor not to exceed \$85,000; that March 29, 1895, the said Samuel B. Anderson and W. H. Winship filed their final report as executors, together with their resignations, which report was approved and said resignations accepted; that on said day appellant was appointed administrator *de bonis non*, gave bond, and qualified as such. The court further found that 452 acres of the Rush county land in a partition proceeding were set off to the widow of decedent; that afterwards an action was brought in the Rush Circuit Court by certain of the creditors against appellee and the heirs of the decedent, to compel appellee, as administrator, to sell the land so set off to the widow to make assets to pay debts; that in said action, the court found that the money received from insurance policies by the widow was used in the payment of the *bona fide* debts of the decedent, and that she was entitled to be subrogated to the rights of the creditors, and that the land set off to her was of less value than the sum so paid out of said money; that the real estate unsold by the former executor was sold by appellee, but on account of the depreciation of the value of

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the real estate, by reason of the panic, the same sold for only \$61,965; that on account of a depreciation of real estate in Missouri, resulting from the panic, there was a loss on the real estate there of \$13,800, and the estate realized therefrom only \$2,000; that appellee, as administrator, has converted all the remaining assets of the estate, real and personal, into cash, and the same amounts to \$71,420.38; that he has paid expenses of administration, under the order of the court, \$10,727.73, and has paid preferred claims under the order of court, \$23,818.78; that the entire amount of indebtedness of the estate did not become known until May, 1895, and the same amounts to about \$143,000, including preferred claims, in addition to the court expenses and expenses of administration; that the entire amount of general debts of the estate is \$110,952.99; and the total assets received by the former executors, including the said insurance money and the amount received by appellee after the payment of the mortgages, taxes and expenses of administration, amounts to \$86,396.67, and that the sum applied *pro rata* on the general debts will pay seventy-seven and one-half per cent. on each and every general debt against said estate; that on January 30, 1897, appellee filed his petition in the Rush Circuit Court to settle said estate as insolvent; that the court found that all the assets of the estate had been reduced to cash, and that there remained an insufficiency of assets to pay the general debts in the sum of \$36,621.71, and that said estate was insolvent; that the court further found that said Samuel B. Anderson, as executor, while acting under a misapprehension of the condition of the estate, and believing the same to be solvent, paid certain creditors, whose claims were only general debts against the estate, in full, which claims amounted to \$33,570.99; that appellee, as such administrator, was ordered to settle the estate as insolvent, to give notice thereof, which was done, and was also ordered to collect by suit, or otherwise, from said creditors whose claims had been paid in full a sufficient sum to equalize all general creditors of

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the estate; that on February 3, 1897, appellee demanded of appellant that he repay to said estate twenty-two and one-half per cent. of the sum so paid to him on said notes by Samuel B. Anderson, as executor, but which the appellant refused to do.

From the facts found we do not see how the court could have reached any other conclusion than that stated. A careful consideration of the facts found by the court leads us to the conclusion that appellee established every fact essential to his recovery. On the proposition that the court erred in its conclusion of law, counsel urge (1) that there is no finding that appellant's claim was paid under a mutual mistake of facts, and that such finding was necessary before appellee could recover. This proposition can not be maintained, for the court expressly found that, when appellant was paid his debt, both he and the executor making the payment believed the estate was solvent. It follows, therefore, that the payment was made under a mutual mistake of the fact as to the solvency of the estate. (2) That there is no finding that the estate was insolvent when appellant's debt was paid, while, on the contrary, it affirmatively appears that it was solvent. It was not necessary to aver in the complaint that the estate was insolvent when the debt was paid, and hence it was not necessary to prove such fact, or for the court to find it, to entitle appellee to recover. The very fact that the estate proved to be insolvent upon final settlement is the material question here, and that fact is found. As to whether the estate was mismanaged by the executor or the administrator, and by reason thereof became insolvent, is a question with which we have nothing to do, for it is in no way presented by the record. (3) That there is no finding that appellee was diligent in ascertaining the conditions of the estate. We are unable to see the necessity of such a finding in a proceeding of this character, and counsel have not convinced us of such necessity. (4) That it is shown that the entire amount of indebtedness became known

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in May, 1895, and appellee did not petition to settle the estate as insolvent until January 30, 1897, and that such laches ought to preclude a recovery, and hence the conclusion of law is erroneous. As we have just said, the conduct of the executor and the administrator in the management of the estate is not before us for consideration. While it is true the law demands of an administrator or an executor the strictest account of his stewardship, and imposes upon him due diligence, care, and fidelity in the management of his trust, and places upon him the duty of responding in damages to parties in interest for a breach of his fiduciary duties, and while we may say that the record discloses the fact that both the executor and appellee did not perform all the duties imposed upon them by law, yet the wrongs that followed, if any, are not subject to review in this action. (5) That there is no finding that the estate has been finally settled as insolvent, and that the full and final dividend to which the creditors are entitled has been ascertained and decreed by the Rush Circuit Court, in which the estate is pending, and by reason of which it was impossible for the trial court to determine the amount of the recovery. If the estate had been finally settled as insolvent, it would follow that the administrator would have been discharged, and hence could not prosecute this action. While there is no express finding that the estate has remained open for the purpose of prosecuting this action, there is an abundant evidence to show that this is true, for when the estate was ordered to be settled as insolvent, the administrator was further ordered to prosecute this and other actions of a like character. But, aside from this, appellant's objection is obviated by the findings, showing the aggregate indebtedness, the aggregate assets, and the per cent. that can ratably be paid upon each general claim. While appellant's learned counsel have urged one or two other reasons why the conclusion of law is erroneous, we do not deem them of sufficient importance to take them up and discuss them.

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The next question in order of discussion is the overruling of the motion for a new trial. The argument upon this question is directed to the sufficiency of the evidence to sustain the special findings as a whole, and to many of the findings specifically. We will consider only those which counsel have discussed. In finding ten the court found that the widow of decedent loaned to the executor \$21,156.25, being insurance money which she had received from life insurance upon her deceased husband, and appellant urges that this finding is contrary to the evidence. There is some conflict in the evidence upon this point, but there is evidence in the record upon which the court could, and doubtless did, base such finding, and this being the case, we cannot weigh the evidence, and the finding must stand. It is shown that the widow and executor acted in good faith in relation to this matter. Every dollar of the money was applied upon the just debts of the decedent, and the creditors (and appellant was one of them) got the full benefit of that large sum of money. It is also shown that the widow accepted under the will, and, out of a large estate, she received in the end only real estate of less value than the money she advanced to the executor. That money was absolutely hers, and creditors of the estate could lay no claim to it. She allowed it to be used in the payment of debts, and received in lieu thereof real estate which, in value, was less than the money she parted with.

Appellant complains that finding nineteen, wherein it is stated that all the assets of the estate had been converted into cash, is not sustained by the evidence. This complaint is based upon the fact that appellant still has an uncollected note for \$1,900, which was given for purchase money of real estate sold by the administrator. In point of fact we may say that, so far as this note is concerned, it has not been reduced to cash, but, as between the creditors and the administrator, it may be properly considered as cash, for the administrator reported the sale of the real estate to the

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court as a cash sale, which report was approved by the court, and he stands charged with the cash. In any event, it is shown that appellant let the matter rest as it is, so that the estate might get the benefit of the interest that would accrue, and that the money could be collected at any time when needed; and appellant testified, also, that he considered the note as so much cash, and that he was responsible for it as cash. In this connection it is also urged that the real estate set off to the widow in the partition proceedings belongs to the estate, and, therefore, constitutes assets not yet reduced to cash. Without going into any extended discussion of this question, it is a sufficient answer to appellant's contention to say that the real estate was regularly set off to the widow in a judicial proceeding, and that in a subsequent proceeding by creditors, to require the administrator to sell the real estate so set off to the widow to realize assets with which to pay debts, it was also judicially found that the insurance money received by the widow was used in the payment of debts of the estate, and that she was entitled to be subrogated to the rights of creditors, etc. These facts show that the question now raised by appellant is *res judicata*, and the judicial proceedings to which we have alluded cannot, in this collateral proceeding, be attacked.

The remaining question discussed by appellant's counsel is that pertaining to the conduct and management of the estate on the part of the executor and appellant as administrator *de bonis non*. We do not hesitate to say that the record shows very reprehensible management of the estate, especially on the part of Samuel B. Anderson, but, however reprehensible it may have been, any rights of creditors that have been prejudiced thereby are not here presented for adjudication, and we dismiss the subject without further comment.

Appellant, as shown by the facts, received from the estate money in excess of that to which he was entitled,—money

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paid to him under an honest belief and mutual mistake that the estate was solvent, and in excess of the *pro rata* share or per cent. which other creditors of the same class will receive, unless such excess can be recovered. He received the money to which in equity and in good conscience he was not entitled.

The legislature has classified debts against an estate, and has provided the order in which they shall be paid. §2534 Burns 1894, §2378 Horner 1897.

It is the policy of the law that claims of the same class shall stand upon an equality. In this case appellant's claim comes within the seventh class, designated as "general debts." It is not right, therefore, that he should receive payment in full of his debt, when others in the same class receive only seventy-seven and one-half per cent. on the dollar; and to the end that all creditors of this class may receive the same rate per cent. upon their claims, both good law and broad equity demand that appellant refund the excess received by him.

From the whole record, we believe the trial court reached a correct conclusion. Judgment affirmed.

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[No. 2,588. Filed Oct. 25, 1899. Rehearing denied June 8, 1900.]

PLEADING.—Payment.—A plea of payment to constitute a bar to an action must allege that payment was made before the commencement of the action. *p. 79.*

SAME.—Payment.—Gravel-Road Certificates.—A plea of payment in an action by the assignee of a gravel-road certificate to enforce the collection thereof must allege that payment was made before the certificate was assigned and before notice to defendant of such assignment. *pp. 80, 81.*

SAME.—Payment.—Gravel-Road Certificates.—An answer by defendant in an action by the assignee of a gravel-road certificate to enforce collection that he furnished gravel and performed certain labor in the construction of that part of the road abutting on his lands, under an agreement with the contractor that the same was to be applied in payment of his assessments, is insufficient, where

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no date was specified on which such contract was entered into, and it was not shown that the contract was made prior to the issue and sale of the certificate. *pp. 81-83.*

ESTOPPEL.—Payment.—Gravel-Road Certificates.—Pleading.—In an action on a gravel-road certificate by the assignee, the defendant answered that his assessments, on which the certificate was issued, had been paid by him in labor and material furnished in the construction of the road abutting his lands, under an agreement with the gravel-road contractor, with the knowledge and consent of the superintendent. Plaintiff replied that it had been the owner of the certificate for ten years and that defendant had made payments of interest thereon during such time, and asked for extension of time, and failed to inform plaintiff of the payment claimed to have been made by him to the contractor until it was too late to bring suit against the superintendent. *Held*, that the facts pleaded by the reply were sufficient to constitute an estoppel to the defense pleaded by the answer. *pp. 83-89.*

APPEAL AND ERROR.—Assignment of Cross-Errors.—The action of the court in overruling a demurrer to the complaint cannot be reviewed on an appeal by plaintiff from the ruling on the answers where no assignment of cross-error was made thereon by appellee. *pp. 89, 90.*

From the Clinton Circuit Court. *Reversed.*

H. C. Sheridan, for appellant.

L. J. Curtis and Morrison & Morrison, for appellees.

WILEY, J.—Appellant was plaintiff below and brought its action against appellee Orr and others to foreclose and enforce a lien for certain gravel-road certificates held by it as assignee. The cause was put at issue, and trial was had by the court, resulting in a general finding and judgment against appellant on its complaint and in favor of appellee Orr on his cross-complaint. The errors assigned question certain adverse rulings to appellant, in this: (1) The overruling of appellant's demurrer to the cross-complaint of appellee Orr; (2) the overruling of appellant's demurrer to the second paragraph of the separate answer of appellee Curran; (3) the overruling of appellant's demurrer to the fourth paragraph of the separate answer of appellee Curran; (4) the sustaining of the demurrer of appellee Orr to the second paragraph of reply to the second and amended

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fourth paragraph of the separate answer of appellee Orr; (5) the sustaining of the demurrer of appellee Orr to the second paragraph of answer to the cross-complaint of Orr; (6) the sustaining of the demurrer of appellee Orr to the third paragraph of reply to the second paragraph and fourth amended paragraph of appellee Orr's answer to the complaint, and (7) the sustaining of the demurrer of appellee Orr to the third paragraph of appellant's answer to the cross-complaint of appellee Orr.

While these several paragraphs of pleading are voluminous, the questions at issue may be briefly stated. The three paragraphs of complaint are identical, except that they are each based on different certificates and describe different tracts of real estate, and a statement of the facts charged in one will suffice for all. The complaint avers the filing of a petition in the commissioners' court, praying for the improvement, grading, etc., of a certain described highway; that the board of commissioners duly found that the requisite number of petitioners whose lands were within two miles of the proposed improvement had signed the petition; that the board thereupon appointed viewers, as required by statute; that they were directed by the board to proceed to examine, view, lay out, and straighten the road to be improved, and make their report to the board at a time fixed in the order appointing them; that the board also appointed an engineer; that said viewers were duly qualified, and filed their report; that said proposed improvement was found by said board to be of public utility; that the benefits assessed exceeded the expenses and damages, and it was ordered and so entered of record that said improvement be made. It is also averred that one Samuel Merritt was appointed superintendent to superintend the proposed work; that as such superintendent he executed his bond to the approval of said board; that he was duly qualified and entered upon the duties of his said office. It is then alleged that said road was constructed; that appellees' lands, describing them,

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were assessed therefor in a fixed sum; that the *pro rata* share of said lands, as fixed by the superintendent, was a certain and definite sum, which is specified; that said superintendent made, executed, and issued certificates of assessment for the construction of said road against the real estate of appellee Orr, by the terms of which the payment thereof was divided into six equal instalments, due six, twelve, eighteen, twenty-four, thirty, and thirty-six months from date as designated by coupons attached. It is further averred that after the levy of said assessments and the issuance of said certificates the same were sold and assigned to appellant before maturity for a valuable consideration, and indorsed by said superintendent and Thomas Slattery & Company. It is also charged that the said Merritt is dead, and his children and heirs at law are made parties. It is then charged that the first two coupons on account of said certificate have been paid, and that on May 23, 1891, the interest on the coupons was paid by appellee Orr to such date. It is then averred that on October 13, 1887, the improvement of said highway was reported to the board as completed and was then turned over to the board of commissioners by said superintendent. It is further charged that such certificate is a first lien upon the real estate described therein; that the appellee Orr is still the owner of the same; that said certificate is due and remains unpaid, wherefore, etc. Copies of the certificate and coupons upon which each paragraph of the complaint is based are filed as exhibits. A demurrer to each paragraph of complaint was filed and overruled. Appellee filed a cross-complaint and an answer in four paragraphs.

The cross-complaint avers, in substance, the same facts as set out in the complaint as to the petition and proceedings before the board of commissioners, the assessment of his lands, the issuing of the certificates sued on, and their assignment to appellant. It is then charged that said certificates have been fully paid by the appellee in the follow-

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ing manner: That on the — day of —, 1886, appellee Orr entered into a written contract with one Charles Pence, the contractor, for the construction of said road, whereby he agreed to furnish gravel from pits on his real estate to gravel about one and one-half miles of said road, at the rate of eight cents per load, and that the pay for such gravel should be applied to the payment of the assessment made against his lands; that by an oral agreement with said Pence appellee was to work in said pit, and furnish a team and hand to haul and work on said road, and to furnish other work and material thereon; that under said contract he furnished gravel for one and a half miles of said road; that he also furnished a team and hand to haul and work in said pit, and in all things complied with his said contract; that the gravel, work, etc., amounted to \$400; that in the settlement between said Pence and appellee, the pay for said work and material was first applied to the payment of said assessments on appellee's real estate; that said Merritt knew of and concurred in said contracts and in the settlement between appellee and said Pence, and that, instead of delivering to said Pence certificates to the amount of said assessments, he was charged with having received pay in said amount, and said certificates were retained by said Merritt as fully satisfied, to be delivered to appellee. It is then averred that said assessments appear as a lien against his real estate and he prays that they be canceled and that the title to his lands be quieted. A demurrer to this cross-complaint for want of facts was overruled.

The first paragraph of appellee Orr's answer was a general denial. In the second paragraph of answer appellee simply avers payment of the certificates sued on, without describing the manner or stating the time of payment. In the third paragraph appellee admits the construction and completion of the road, the assessments made against his lands, and the issuance of the certificates, but denies the assignment to appellant. The amended fourth paragraph

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of answer is a special plea of payment, and the facts alleged therein are the same as stated in the cross-complaint. A demurrer to the second, third, and amended fourth paragraphs of answer was overruled.

Appellant's answer to the cross-complaint was in two paragraphs, the first of which was a general denial. In the second paragraph it is averred that appellant purchased the certificates sued on and paid a valuable consideration therefor before their maturity, and without notice of the facts stated in the cross-complaint; that such purchase was made on the — day of —, 1886; that ever since appellant has been engaged in the banking business in the city of Frankfort, Indiana, and has known the cross-complainant intimately all of said time; that it has had possession and has been the owner of said certificates since their purchase; that during said time appellant's president, cashier, and other officers have frequently and at divers times, since the maturity of the first coupon, notified the cross-complainant that it was the owner of the certificates; notified him to call at its office and pay the same, and, since the maturity of the last of said certificates, appellant, in the due course of mail, has frequently demanded of appellee to call at its office and pay said certificates. It is further alleged that appellee frequently called at appellant's office, and conversed with its officers within the past ten years in reference to said certificates, but at no time did he ever claim that any portion of them had been paid; that frequently during said last ten years appellee promised and agreed with appellant to pay the same; that he had frequently and at various times begged and requested appellant to extend the time of the payment and give him an opportunity to pay the same without suit; that appellant has threatened suit against appellee on said certificates, and he called at appellant's office and begged appellant not to enter suit, but to give him further time and that he would pay the same; that on May 23, 1891, appellee called at appellant's bank and paid on

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each of said certificates all the interest then due, and such interest was credited upon the back thereof in appellee's presence; that on the 31st of August, 1894, appellee paid as interest on said certificates the sum of \$10, which was credited thereon; that when said payments were made, and at no other time, did appellee claim or pretend that said certificates had been paid, but on the contrary led appellant to believe that there was no defense existing against the collection thereof. It is further alleged that when said payments were made, and until the — day of March, 1896, the said Samuel Merritt, the superintendent who issued said certificates, was living in the said city of Frankfort, at which time he died, and that at any time previous to his death the facts relating to said certificates were obtainable from him by appellant. It is further charged that it was wholly and entirely because of the promises made by appellee that it deferred its action on said certificates and deferred the collection thereof; that it was induced by his requests and promises of payment; that because of being led by appellee to believe that there was no objection or defense existing against said certificates, it deferred a suit at law to collect the same till after the death of said Merritt. It is also alleged that appellant had no knowledge of the facts set out in the cross-complaint till after the death of said Merritt, and until after this action was commenced, when a knowledge of said facts was first imparted by the filing of the cross-complaint and answer herein; that by reason of said facts appellant was induced to defer its action to collect and enforce said certificates until it was too late for it to obtain the information that must necessarily have been possessed by said Merritt, and until it was too late to bring an action against said Merritt in the event that the facts set up in the cross-complaint are true; and that by reason of the facts above stated appellant was misled and prevented, in the event said facts are true, from bringing suit upon the bond of said Merritt as such superintendent,

who would have been liable thereon at any time before the statute of limitations had run against him for selling such certificates if the same were paid. The prayer of this paragraph of answer is that appellee Orr be estopped from pleading said contract and payment and the facts charged in his cross-complaint.

Appellant replied to the second paragraph of the separate answer and the amended fourth paragraph of appellee's separate answer, in two paragraphs. The first was a general denial, and the second sets up the same facts as alleged in the second paragraph of answer to the cross-complaint. A demurrer for want of facts was sustained to the second paragraph of answer to the cross-complaint and to the second paragraph of reply to the second and amended fourth paragraphs of the separate answer of appellee Orr. After these rulings appellant filed its third paragraph of reply to the second and amended fourth paragraphs of the separate answer of appellee Orr. These paragraphs seek to state facts constituting an estoppel *in pais*, and are similar to the preceding paragraphs of a like character, and differ from them in that the facts relied upon are set out more fully and with greater particularity. Appellant averred in these paragraphs that the conduct, acts, words, and promises of appellee were intended to and did mislead it, by which its right of action against Merritt was postponed until the statute of limitations had run against it, and until after his death, and left it without remedy except its right to enforce its lien, etc. A demurrer to each of them was sustained. There is no cross-error assigned. As the various questions presented for decision may arise upon a retrial of the cause in case of reversal, it will be necessary for us to decide each of them, and we will take them up in the order in which counsel for appellant has presented them.

It is urged that the second paragraph of appellee's answer is bad. In this paragraph appellee admits the construction of the gravel road, the assessments against his lands, etc.,

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as charged in the complaint, and it avers, in the language of the pleader, "that he fully paid said assessments and that he owes nothing on account thereof." It seems to us that this paragraph of answer is defective in at least two particulars: (1) There is no averment that payment was made before the beginning of the action. A plea of payment does not need to allege the amount paid, nor the exact date of payment, nor the person to whom the payment was made. *Demuth v. Daggy*, 26 Ind. 341. But it is necessary to allege, to constitute a bar to an action, that it was paid before the commencement of the action. *Epperson v. Hostetter*, 95 Ind. 583; *Johnson v. Breedlove*, 104 Ind. 521; *Cranor v. Winters*, 75 Ind. 301; Work's Prac. §555.

The reason for the rule that a plea of payment should aver that payment was made before the commencement of the action is based upon the fact that to constitute a complete defense the payment must have been made before the plaintiff sought his remedy at law. If payment is made after suit is brought, it does not go in bar of the action, but only in mitigation of damages, unless it appears that costs accrued to the time of payment have been included in the payment, for the general rule prevails that a plaintiff who successfully maintains his action shall recover costs.

Works' Practice and Pleading, at §596, says: "Payment made after the suit is brought cannot be pleaded in bar of the action. It is and has been held that such payment may be proved in mitigation of damages. But the defendant may plead payment of the debt after the suit is brought, not in bar of the action, but in bar of the further maintenance of the action." See *Bischoff v. Lucas*, 6 Ind. 26; *Bank v. Brackett*, 4 N. H. 557; *Herod v. Snyder*, 61 Ind. 453.

(2) The second paragraph of answer is bad for the additional reason that it fails to allege that the payment was made before the certificates were assigned to appellant, and before notice to appellee of such assignment. In this connection it is important to look at and determine the force of

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some of the provisions of the statute under which the certificates in suit were issued, for such provisions may be of controlling importance in the discussion of other pleadings in question. The proceedings to establish the gravel road described in the complaint were had under the act of April 8, 1885 (Acts 1885, pp. 162-169). By section nine of the act, after the improvement has been ordered and the assessments confirmed, it is made the duty of the commissioners to appoint a superintendent who shall have charge of the work. He is required to execute a bond, and is made liable thereon by any person aggrieved. By section ten the superintendent is required to let the contract for construction, and the contractor is required to give bond. By section eleven it is made the duty of the superintendent to make assessments on all lands benefited, ratably upon the amount of benefits, etc. He is also required to issue certificates which certify the sum assessed against each tract of land. By this section, also, the superintendent is authorized to give such certificates in payment of any sum due for any labor performed, or to negotiate and sell them at not less than their par value. By this section it is provided that any holder of the certificates, when any instalment becomes due and remains unpaid, may maintain an action thereon. It is also provided that such certificates shall be assignable as promissory notes. The certificates in suit are made payable at the First National Bank of Frankfort, Indiana. By these provisions of the statute, it is plain, from the averments of the complaint, that appellant is legally and rightfully the owner of the certificates in suit, and can successfully maintain an action upon them, unless some valid defense is interposed. The complaint avers that appellant purchased, for a valuable consideration and before maturity, these certificates, and that they were assigned to it. Payment by the appellee of the certificates to the superintendent or contractor, after such purchase and assignment, could not defeat an action for their collection in the hands of the purchaser and holder,

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in the absence of an averment which would tender that issue. We are confronted with the fact that they are made by statute assignable "as promissory notes." A note not negotiable by the law merchant may be assigned, and by such assignment the title passes to the assignee, and he may maintain an action for its collection. In such case an answer by the payor that he had paid the note to the original payee would not be good unless it showed that payment was made before the assignment and before he had notice thereof. When a debt is evidenced by a non-negotiable instrument, and the instrument is not produced when the payment is made, such payment is made at the risk of the debtor; and if it turns out that the instrument has been assigned, and is held at the time of payment by another party, the payment is not a valid one, and will not discharge the payor from liability. *Clark v. Iglestrom*, 51 How. 407; *Mobley v. Ryan*, 14 Ill. 51; *Capps v. Gorham*, 14 Ill. 198. We can not indulge any presumption in favor of the answer we are now considering, and are required to construe it most strongly against the pleader. *Nill v. Comparet*, 15 Ind. 243; *Helms v. Sisk*, 8 Blackf. 503; *Woodward v. Elliott*, 13 Ind. 516; Chitty on Bills, 393; Works' Prac. §595, p. 384. From the authorities, and what we have said, the second paragraph of appellee Orr's answer was insufficient to withstand a demurrer for want of facts, and the demurrer should have been sustained.

The amended fourth paragraph of answer, it seems to us, is bad. This paragraph of answer is a special plea of payment, wherein the facts relied upon constituting payment are set out. Appellee Orr there relies upon an alleged contract with the contractor for the construction of that part of the road abutting on his lands, that he would furnish a certain amount of gravel and perform certain labor, which was to be applied in discharge of his assessments. The answer avers that this contract was made in 1886, but fails to specify any particular date. It further avers that appel-

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lee complied with the contract; that he furnished gravel and performed labor sufficient to pay his assessments, and that the superintendent concurred therein. It appears from the record that the petition for the road was filed June 9, 1886; that the viewers made their report August 5, 1886; that on said date the commissioners approved said report and confirmed the assessments as made; that they at that time appointed a superintendent and ordered the road constructed. The certificates sued upon bear date of September 10, 1886. It does not appear any place in the amended fourth paragraph of answer when the contract between appellee and Pence was made, except that it was in 1886, nor that it was made before the certificates were issued and assigned, nor that it was made before appellee had notice of such assignment. If appellee paid the certificates or assessment as alleged, it was his duty to secure the certificates at the time of payment, and have the lien created by the assessment against his lands canceled. If he paid them after their assignment to appellant, this paragraph of answer does not state facts constituting a defense.

In *Mobley v. Ryan*, 14 Ill. 51, 56 Am. Dec. 488, it was held that if a debt is evidenced by a non-negotiable instrument, as a bond, and the instrument is not produced when the payment is made, such payment is made at the risk of the payor, and if it turn out that the instrument has been assigned and is held at the time by another party, the payment is not a valid one. In this case appellee permitted these certificates to remain outstanding and uncanceled for ten years after, he alleges, he had paid them. He was bound to know that these certificates were issued, for the law declares it the duty of the superintendent to issue them, and he is presumed to know the law. He is further chargeable with the knowledge that the certificates were assignable, and that the superintendent could negotiate and sell them at par, as was done in this case. Yet appellee remains

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silent for over ten years, permits these certificates to go upon the market, is satisfied to let the assessments remain against his lands and uncanceled, and takes no steps to have them canceled until suit is brought to enforce and foreclose the lien.

The authorities cited in support of our conclusion as to the second paragraph of answer apply with equal and even with stronger force here, and with those here cited lead us to hold that the court below erred in overruling the demurrer to the amended fourth paragraph of answer.

As to the first error assigned, the overruling of appellant's demurrer to the cross-complaint of appellee Orr, it is sufficient to say that the facts charged therein are the same as those set up in the amended fourth paragraph of answer. The only material difference between the two is that in the cross-complaint affirmative relief is sought, while in the amended fourth paragraph of answer the facts are pleaded in bar of appellant's right of action. While other objections are urged to the sufficiency of the cross-complaint, those made to the amended fourth paragraph of answer, and which we have already discussed, are applicable to it, and upon the same reasoning and upon the same authorities we must hold the cross-complaint bad as against a demurrer for want of facts, and that it was error to overrule a demurrer to it.

We next come to a consideration of the fourth, fifth, sixth, and seventh specifications of the assignment of errors. The fourth and sixth challenge the action of the court in sustaining appellee's demurrer to the second paragraph of reply to the second and amended fourth paragraphs of the answer of appellee Orr, and also the sustaining of the appellee's demurrer to the third paragraph of reply. The fifth and seventh assail the action of the court in sustaining the appellee's demurrer to the second and third paragraphs of appellant's answer to the cross-complaint. These several pleadings are drawn upon substantially the same facts, and

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differ only in phraseology. In each of them appellant seeks to state facts which constitute an estoppel *in pais*, and they all may be considered together.

In the former part of this opinion we have given a *resume* of these several pleadings, and a repetition of them would be useless. Before considering the sufficiency of the several paragraphs, it is important to understand what is ordinarily required to constitute an estoppel *in pais*. Fortunately this question has been fully adjudicated in this State, and the authorities are uniform. To constitute an estoppel *in pais*, the following elements must appear, viz.: (1) A representation or concealment of material facts; (2) the representation must have been made with a knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) the representations must have been made with the intention that the other party should act upon it, and (5) the other party must have been induced thereby to act. *Roberts v. Abbott*, 127 Ind. 83; *Kuriger v. Joest*, 22 Ind. App. 633. (a) Representation or concealment of material facts. It must be conceded that these pleadings do not show any representation of the material facts, but it is to be remembered that silence, where it is the duty of the party to speak, is equivalent to concealment. *Studdard v. Lemmond*, 48 Ga. 100; *Markland, etc., Co. v. Kimmel*, 87 Ind. 560; *Jeneson v. Jeneson*, 66 Ill. 259; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63; *Niven v. Belknap*, 2 Johns. (N. Y.) 573; *Cady v. Owen*, 34 Vt. 598; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 5 Sup. Ct. 1061. If, therefore, the first element of estoppel is present, it must rest upon concealment of material facts, or silence, which, in law, is concealment, and it must appear that it was the duty of the appellee to speak. Appellee knew that appellant had purchased, was the owner and holder of, and had in its possession the certificates in suit. He knew that appellant believed that it held against his land a valid and subsisting

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lien by which it expected to reimburse itself, if necessary, by a foreclosure thereof, for he was repeatedly notified thereof and often requested to pay the amount represented by the certificates and coupons. He even paid the first two coupons to mature, and twice thereafter paid the interest. He knew whether or not he had paid the certificates, or had paid the assessments made against his lands. Under these facts, it was his duty to speak, that appellant might be advised of the situation in which it was placed. This being true, the first element of an equitable estoppel was present, as shown by the pleadings. (b) Again, it fully appears that appellee remained silent, with a full knowledge of the facts that he thus concealed, and hence, the second element of an estoppel was present. (c) The facts charged in these pleadings clearly show that appellant was ignorant of the facts relied upon by appellee as set forth in his cross-complaint and special paragraphs of payment, and hence the third element of estoppel is established. (d) As appellee thus concealed from appellant these material facts, it was necessary for appellant, in its answer to the cross-complaint and its reply to his answer, to aver that his conduct and silence were intended to operate as a delay on its part, and that they were intended that appellant should act upon them. It was also necessary for appellant to aver that it did so delay and act. This it did in full and specific terms, and, by so averring, the answer to the cross-complaint and the paragraphs of reply under consideration are brought within the fourth element of estoppel. (e) Was the appellant induced by the conduct and silence of the appellee to forego its remedy, if it had any, against the superintendent, for the fraud practiced upon it by him in selling and assigning to it certificates which had been paid, and which the superintendent agreed to cancel? If it did, then it acted upon such conduct and silence to its detriment, and if these pleadings show this fact, then we have present the fifth, and all the elements of an equitable estoppel.

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As we have seen, the superintendent was required to give bond with freehold sureties, conditioned for the faithful performance of the duties assigned him; he was required to execute certificates against each tract of land; he was authorized to give such certificates in payment for labor performed, to negotiate and sell them, and such certificates were made assignable the same as promissory notes. It is shown that he did all these things required of him by statute, except to pay for labor with them. Under the conditions of his bond he was liable to any person aggrieved for any malfeasance or official misconduct. If he concurred in the contract between appellee and Pence, and if such contract was one which could have been enforced (and as to this question we do not express any opinion), yet it seems clear to us that if the superintendent sold and assigned the certificates to appellant, which had been paid as alleged, and which were to have been surrendered to appellee, such action on the part of the superintendent would have constituted such fraud and official misconduct on his part as would render him liable both personally and upon his official bond for such damages as resulted to appellant therefrom. There can certainly be no doubt as to this proposition, for it finds support both in morals and in law, and is strengthened by equity and common honesty. These facts having been concealed from appellant until any right of action against the superintendent had been lost to it, it is without remedy, unless appellee is estopped to interpose his defense under the facts pleaded.

There is a long line of cases which establishes the rule that a person, by admissions, may be estopped from pleading forgery, and of the many cases so holding we cite the following: *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. 613; *Lewis v. Hodapp*, 14 Ind. App. 111; *Shisler v. Vandike*, 92 Pa. St. 447; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Workman v. Wright*, 33 Ohio St. 405; *Owsley v. Philips*, 78 Ky. 517; 2 Randolph on Com. Paper 629. Admissions,

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in this connection, are but representations, and as silence, where it is the duty of the party to speak, is equivalent to concealment, and these constitute the first element of estoppel, it follows, both by reason and analogy, that a party may be estopped by conduct where such conduct leads another to act or to refrain from acting, to his detriment. Under the facts pleaded, appellant undoubtedly suffered a change in its relations from refraining from steps which otherwise might and probably would have secured it in its rights as against the superintendent on his bond, as we have seen it could have done. By the conduct of appellee, appellant's relations were changed. In *Kuriger v. Joest*, 22 Ind. App. 663, this court said: "As to what is required to constitute a change of relations may be easily determined from authorities. Thus, in *Purviance v. Jones*, 120 Ind. 162, it was held that where one is induced to forego his purpose to secure his money before the statute of limitations has barred his claim, by the assurance of the debtor that a note has been signed and delivered to a bank for his benefit, he may, upon the death of the debtor with the note still in his possession, be entitled to compel a delivery, or require it to be treated in an equitable suit as having been delivered as represented. In discussing the question, Mitchell, J., on page 165, said: 'It may be that the evidence was such as to have justified a finding that the note had been delivered to the bank for the plaintiff's benefit; but the fact was not so found. The intestate, having received the plaintiff's money, may have induced him to forego any effort to enforce collection, upon the assurance that a note had been left with the bank, for the amount of the debt, for his benefit. If the plaintiff rested upon that assurance until the statute of limitations had barred the debt, the estate may now be estopped to say that the note was not delivered, as against one who relied upon the statement and who would now suffer actual pecuniary loss if the note, actually signed, was not treated as having been delivered according to the represen-

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tations made and relied upon.' " See, also, *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657.

The supreme court of Texas, in the case of *Weistein v. Bank*, 69 Tex. 38, 6 S. W. 171, has stated the rule as follows: "It has been held by this court that when one party has been prevented or induced by the conduct and representations of another from taking prompt action for the collection of his debt, that this is such a change in his position for the worse as to meet the requirement of the law in order to create an estoppel," citing as authority, *Schwarz v. Bank*, 67 Tex. 217, 2 S. W. 865.

Herman on Estoppel, Vol. 2, §780, says: "It is not necessary that a party should act affirmatively upon a declaration to create an estoppel. If he had acted not in reliance upon it, but has means in his power to retrieve his position, and, relying upon the statement and in consequence of it he refrains from using these means, the estoppel will be enforced for his benefit."

It has been held that a party may be concluded by inferences which naturally arise from his conduct as well as by express words. *Maxon v. Lane*, 124 Ind. 592; *Irvine v. Scott*, 85 Ky. 260, 3 S. W. 163; *Pisen v. Brown*, 73 Tex. 135, 10 S. W. 661. See, also *Wisehart v. Hedrick*, 118 Ind. 341; *May v. Council* (Iowa), 39 N. W. 879; *Wise v. Newatney*, 26 Neb. 88, 42 N. W. 339.

The question now under discussion was before this court in *Kuriger v. Joest*, 22 Ind. App. 663, and many authorities collected bearing upon the point in issue. The conclusion reached in that case, and fully sustained by the authorities, was in harmony with the position assumed by the appellant here, and we content ourselves by referring to that case without further citations to, or quotations from, the authorities.

From the great weight of authorities and upon elementary principles as established by the text-writers, the wholesome and general rule may be deduced that where, by

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the conduct or representations of one, another is induced to act, or to refrain from acting, and injury results to him, the party making the representations is therefore estopped from denying the truth of such representations, or, if the injured party acts, or refrains from acting, on the conduct of his adversary, the latter is estopped from relying upon his conduct as a shield or defense. By these authorities we are led to the conclusion that appellant's second paragraph of reply to the second and amended fourth paragraphs of appellee Orr's answer, that appellant's second paragraph of answer to the cross-complaint, that the third paragraph of appellant's reply to the second and amended fourth paragraphs of answer, and the third paragraph of appellant's answer to the cross-complaint, were each sufficient to withstand a demurrer for want of facts, and that it was error to sustain the several demurrers thereto.

Appellee has urged some objections to the complaint, but he has not put himself in a position to have his objections considered, for the reason that he has not assigned cross-error, and, hence, as to the sufficiency of the complaint, and the action of the court in overruling appellee's demurrer thereto, no question is presented by the record.

The Supreme Court, in *Anderson, etc., Assn. v. Thompson*, 88 Ind. 405, has put at rest this question, wherein it was held that, where a plaintiff appeals from the judgment below, the defendant, appellee, cannot, as a rule, call in question the sufficiency of the complaint in the Supreme Court, except by the assignment of cross-error presenting that question.

For the reasons given above, the judgment is reversed, and the court below is directed to sustain appellant's demurrer to the cross-complaint of appellee Orr; to sustain appellant's demurrer to the second and amended fourth paragraphs of the answer of appellee Orr; to overrule the demurrer to the amended fourth paragraph of the separate answer of Orr; to overrule the demurrer to the second para-

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the 5th day of September, 1886, requesting him to pay said rent, which was then due, within ten days, and in default thereof to deliver to her the possession of the leased premises; that the ten days had expired before the commencement of the action, and the lessee had failed to pay the rent and still unlawfully and wrongfully held possession of the premises and kept the lessor out of the possession thereof, to her damage in the sum of \$100. A copy of the notice served is also made a part of this complaint. The lessor demanded judgment for the possession of the premises, \$100 damages for the unlawful detention of her property, etc. The answer then avers that such further proceedings were had in said suit before said justice of the peace, that on the 4th day of October, 1886, the said Hannah C. Stewart obtained a judgment against the said William R. Nixon for the immediate possession of said leased premises and \$100 damages, and all costs accrued and to accrue in said cause; and that on the 5th day of October, 1886, the said justice before whom said judgment was obtained, issued and delivered to one Simon R. Roberts, as constable, a writ of ejectment commanding said constable to remove the said William R. Nixon from said leased premises and to collect the costs and damages awarded against him by said justice, and that said constable under and by virtue of said writ ejected the said William R. Nixon and removed him and his effects off of said leased premises and placed said Hannah C. Stewart in full possession of said farm, and on the 7th day of October, 1886, said constable made return on said writ, which return showed the facts as aforesaid. And it further showed that he had collected the said judgment of \$100 and costs in full, and said constable filed with the said justice the receipt of the said Hannah C. Stewart for the judgment in full and acknowledging the possession of said farm, which receipt was signed by the said Hannah C. Stewart. It is then averred that the judgment was in fact paid in full, and that at the time of the trial of said

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cause before the said justice of the peace, the said two notes, which were the notes herein sued on, were both surrendered and delivered to said justice of the peace, together with said written lease, by said Hannah C. Stewart, and that they remained on file in the hands of said justice of the peace for for a period of nearly one year, and the said Hannah C. Stewart has never claimed any further interest or ownership in the said notes in suit or either of them. An answer alleging the same facts was filed by appellee, William R. Nixon.

We think the opinion upon the former appeal settles the question as to the sufficiency of this answer. It is therein held: "Notwithstanding the fact that the notes were negotiable by the law merchant, if in an action by the lessor against the lessee the notes, still in the hands of the former, were treated by the parties, and by the court, as collateral security for the rent, and were surrendered for the use of the lessee, or for cancelation, the subsequent indorsement of the notes by the lessor, after their maturity, could confer no right of action upon the indorsee." *Campbell v. Nixon*, 2 Ind. App. 463. And if the notes in suit were brought into the trial and delivered to the justice, or filed for the use of the lessee, or surrendered as the result or as a part of the action for possession, neither the lessor nor her indorsee could maintain an action upon said notes against the lessee. *Campbell v. Nixon, supra*. The answer was sufficient. The lower court did not err in overruling the demurrer thereto.

The questions arising upon the motion for a new trial relate to the admissibility of certain evidence and the refusal of the court to grant a new trial upon newly discovered evidence. We have carefully considered the objections made by appellant's counsel as to the admissibility of the evidence complained of, and find no erroneous ruling of the lower court in this regard. The supplemental motion for a new trial is based upon newly discovered evidence. A new trial will not be granted on account of newly discovered evi-

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dence unless such evidence would be competent upon a retrial of the cause. But conceding that the newly discovered evidence might be competent upon a retrial of this cause, still a new trial could not be granted because the affidavit filed in support of the motion does not show diligence upon the part of appellant. That part of the affidavit by which diligence is attempted to be shown is as follows: "That he could not, with reasonable diligence, have discovered and produced said evidence at the trial of the cause or at the time of filing said motion for a new trial of the same." The general statement that reasonable or due diligence had been used to discover the new evidence is not sufficient; it is necessary that the facts, constituting the diligence used, be set out in the affidavit so that the court can decide whether due diligence was used. *Keisling v. Readle*, 1 Ind. App. 240; *Kelley v. Kelley*, 8 Ind. App. 606.

The evidence produced upon the trial of this cause was sufficient in every respect to support the finding and judgment of the lower court. Judgment affirmed.

**BOARD OF COMMISSIONERS OF MORGAN COUNTY v. THE
FIRST NATIONAL BANK OF MARTINSVILLE, INDIANA.**

[No. 3,101. Filed June 19, 1900.]

TAXATION.—National Banks.—A national bank cannot recover taxes paid by it on its real estate because the value thereof was not deducted from the valuation of the capital stock of the bank as required by §8471 Burns 1894, since the wrong, if any, was the overvaluation of the capital stock, which affected the individual stockholders, and not the assessment of the real estate as such to the bank.

From the Morgan Circuit Court. *Reversed.*

W. L. Taylor, Attorney-General, *W. R. Harrison* and *Rowland Evans*, for appellant.

W. S. Shirley, *M. H. Parks* and *Oscar Matthews*, for appellee.

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ROBINSON, C. J.—Appellee recovered a judgment for taxes, which it was claimed had been wrongfully and illegally assessed and paid. The questions discussed are that the finding and judgment are contrary to the evidence and law, and are not sustained by sufficient evidence.

The taxes claimed to have been illegally assessed and collected from appellee were upon land in Green township, Morgan county. Appellee bank is located and does business in Martinsville, in Washington township, Morgan county.

All property within the jurisdiction of this State is subject to taxation unless expressly exempted. No claim is made that the property in question was exempt from taxation.

In an action, under §§7915-7917 Burns 1894, to recover taxes alleged to have been wrongfully and illegally assessed, it must be made to appear that the assessment was not only irregular and unauthorized but that the property was not justly subject to the assessment. *Durham v. Board, etc.*, 95 Ind. 182; *Board, etc., v. Armstrong*, 91 Ind. 528; *Board, etc., v. Murphy*, 100 Ind. 570; *Hilgenberg v. Board, etc.*, 107 Ind. 494.

The sections of the statute (Burns 1894) applicable to the questions presented are the following:

Section 8470. "The shares of capital stock in any bank located within this State, whether organized under the laws of this State or of the United States, shall be assessed to the owner thereof in the township, city or town, where such bank or banking association is located and shall be taxed at the same rate as other personal property in the same locality is taxed, and with reference to its value on the first day of April of the current year."

Section 8471. "The president, cashier or other accounting officer of such bank, or banking association, shall between the first day of April and the first day of June of each year make out a statement, under oath, in duplicate, showing the number of shares comprising the capital stock of such bank,

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the name and residence of each stockholder, with the number of shares owned by such stockholder in such bank, and shall affix what he deems the true cash value of each of said shares, and also, the true cash value of the entire capital stock of such bank, or banking association, on the first day of April, and shall deliver one of such statements to the assessor in the township wherein such bank or banking association is located, and the other to the county auditor and such capital stock shall thereupon be listed and assessed by the assessor, and return thereof made in all respects the same as similar property belonging to other corporations and individuals. And whenever any such bank shall have acquired real estate or other tangible property the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such bank."

Section 8473. "The county auditor shall enter the valuation of such capital stock on the tax-duplicate of the current year and shall compute and extend taxes thereon the same as against the valuation of other property in the same township, town or city."

Section 8421. "All personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of April of the year for which the assessment is made, with the following exceptions:
* * * Third. All shares in banks shall be assessed to their owners in the city or town where the bank is located."

Section 8460. "Every person required by this act to make or deliver such statement or schedule shall set forth an account of the property held or owned by him, as follows:
* * * Personal property—chattels. First. All shares in banks organized in this State under any law of this State, or of the United States, and their full market value, after deducting the value of the real estate as taxed to the banks."

Section 8431. "Real property shall be assessed in the place where situated, and to the owner, if known; if not, then to the occupant, if any; and if there be no occupant, then as unknown."

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Section 8411. "For the purpose of taxation, real property shall include all lands within this State, and all buildings and fixtures thereon and appurtenances thereto, except in cases otherwise expressly provided by law; personal property shall include * * * all shares in banks organized in this State under any law of the United States, but in estimating the value of such shares, deduction shall be made of the value of all real estate taxed to the bank."

Section 5219, U. S. R. S. provides: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Without the section last quoted or some similar authority from Congress, shares of national bank stock could not be taxed by state authority. But by this provision shares of stock are taxable by the state, subject only to the restrictions therein named, and the bank's real estate may be taxed as other real estate.

It is manifest from the above statutory provisions that the legislative intent was not to include real estate in the valuation of the capital stock of a national bank and thus exempt such real estate from taxation as such. If, for the

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purposes of taxation, real estate could be included in the valuation of the capital stock of the bank and is located in a different township, town or city from that of the bank's location, it would follow that real estate might thus be transferred for taxation from one municipality to another. But it is clear that such was not the intention. It is plainly intended, and is so provided, that real estate shall be assessed as such in the township, town or city where located.

During the period covered by the judgment the shares of stock of the bank were assessed to the individual stockholders at par, and the tax was paid by the individual stockholders. The par value of the bank's stock was \$70,000, which included the land in question. During this time the bank itself also paid taxes on the land assessed in the township of its location and these taxes so paid are the taxes appellee seeks to have refunded in this suit. The question then is, were these taxes wrongfully assessed?

In estimating the value of the stock for taxation the value of the real estate should have been deducted as directed by the statute. This was not done, and the taxes paid by the stockholders included taxes on the land. The land was properly assessed to the bank and in the township where located, and the bank paid the taxes. These taxes were not wrongfully and illegally assessed. They were properly assessed. There was double taxation, but that portion which was wrongful and illegal was what the stockholders at the place where the bank is located paid on the land, not what the bank paid. If it be the fact that the land was included in the valuation of the capital stock and the stockholders paid taxes upon the basis of such valuation, then the amount paid by each stockholder in excess of what his taxes would have been upon a valuation excluding the real estate was wrongfully and illegally assessed. But, as disclosed by this record, the only taxes sought to be recovered were properly assessed. The land was taxable as such and was properly assessed to the bank in the place where the land is located.

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If a wrong was done it was the overvaluation of the capital stock, and not the assessment of the real estate as such to the bank. *Loftin v. Citizens Nat. Bank*, 85 Ind. 341.

Judgment reversed.

AYRES, RECEIVER, v. FOSTER.

[No. 8,213. Filed June 19, 1900.]

RECEIVERS.—*Authority to Sue.—Pleading.—Evidence.*—Where the authority of the plaintiff to sue the defendant receiver was not properly questioned by answer, it was not necessary that such authority be shown in evidence on the trial of the cause. *p. 101.*

BILLS AND NOTES.—*Party in Interest.—Burden of Proof.*—The holder of a note is *prima facie* the owner thereof, and entitled to sue upon it, and the burden of showing that he is not the real party in interest, as well as of showing payment, is upon the defendant in the event of a suit by the holder. *p. 101.*

PRACTICE.—*Defect of Parties.—Waiver.*—Objection to a complaint on account of defect of parties, if not made ground of demurrer, or set up by way of answer in abatement, is waived. *p. 101.*

From the Huntington Circuit Court. *Affirmed.*

J. B. Kenner, U. S. Lesh and T. G. Smith, for appellant.

R. A. Kaufman and J. C. Branyan, for appellee.

BLACK, J.—The appellee recovered judgment against the appellant as receiver of the Huntington County Agricultural Society upon the the non-negotiable promissory note of the society, payable to the order of Susan F. Thompson and Melissa Thompson, who, it was stated in the complaint, assigned it before maturity by indorsement on the back thereof, for a valuable consideration, as follows: "Without recourse on us or either of us," signed by the payees. There was an answer in three paragraphs, the first being the general denial. In the second, the appellant alleged payment, and in the third, as substituted on the trial, the original being lost, that the appellee was not the owner of the note. The appellee replied to the second paragraph of

answer by a general denial, and to the third, that one John M. Hargrove assigned the note to the appellee for a valuable consideration prior to the commencement of the action, that the appellee had owned and held it ever since, and that it is due, owing, and unpaid to him or any one for him.

No question is presented upon any of the pleadings. The assigned error argued by counsel is the overruling of the appellant's motion for a new trial, the only cause for a new trial, recognized as such by the statute, discussed here, being that the verdict was not sustained by sufficient evidence.

The complaint showed the appointment of the appellant as receiver by the court below and that he had qualified as such; and it was alleged in the complaint that, on, etc., the appellee obtained an order from that court duly authorizing and permitting him to sue the appellant as such receiver on said note.

It is claimed on behalf of the appellant that it was necessary, not only thus to allege authority to bring suit against the receiver, but also to prove upon the trial the granting of such authority. That the averment of such authority in the complaint was necessary is a settled rule of pleading, where the defendant is not a receiver appointed by a court of the United States. *Keen v. Breckenridge*, 96 Ind. 69; *Wayne Pike Co. v. State*, 134 Ind. 672; *Peirce v. Chism*, 23 Ind. App. 505.

It is provided by statute, §368 Burns 1894, §365 Horner 1897, that pleadings denying the jurisdiction of the court or in abatement of the action, and all dilatory pleadings, must be supported by affidavit; and the character or capacity in which a party sues or is sued, and the authority by virtue of which he sues, shall require no proof on the trial of the cause, unless such character, capacity or authority be denied by a pleading under oath, or by an affidavit filed therewith, and that an answer in abatement must precede, and can not be pleaded with, an answer in bar, and the issue thereon must be tried first and separately.

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The want of authority to sue from the court by which the receiver was appointed would be matter in abatement; and the authority of the appellee to sue not having been questioned properly in pleading, it was not necessary that it should be shown in evidence.

Assuming, without deciding, that the question whether the appellee was the owner of the note and therefore the real party in interest was put in issue, the determination of the jury thereon can not be disturbed. This is true also of the question whether or not the note had been paid.

The possession of a promissory note by a reputable person other than the payee is *prima facie* evidence of ownership and of the authority of such person to collect the note, whether it has or has not been indorsed by the payee in writing. *Paulman v. Claycomb*, 75 Ind. 64; *Bush v. Seaton*, 4 Ind. 522.

The appellee, being the holder of the note, was *prima facie* the owner thereof and entitled to sue upon it, and the burden of showing that he was not the real party in interest, as well as of showing payment, was upon the appellant; and it can not be said that the jury had no foundation for the conclusions reached upon these questions.

The appellant requested the court and the court refused to instruct the jury that if they should find from the evidence that the appellee claimed that John Hargrove owned the note in suit, and while such owner assigned it to the appellee, but such assignment was not by written indorsement on the note, and said Hargrove was not a party to the action, the jury should find for the appellant.

If the failure to make such assignor a defendant constituted a defect of parties, as to which we need not decide, the appellant could not thus make the defect available; for such defect if not made a ground of demurrer or set up by an answer in abatement, is waived. §342 Burns 1894, §339 Horner 1897, cl. 4; §346 Burns 1894, §343 Horner 1897; *Strong v. Downing*, 34 Ind. 300; *Hill v.*

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Shalter, 73 Ind. 459; *Thomas v. Wood*, 61 Ind. 132; *Lee v. Basey*, 85 Ind. 543; *Shane v. Lowry*, 48 Ind. 205; *Clough v. Thomas*, 53 Ind. 24; *Atkinson v. Mott*, 102 Ind. 431; *Carico v. Moore*, 4 Ind. App. 20.

Judgment affirmed.

BOGUE ET AL. v. MURPHY ET AL.

[No. 8,449. Filed June 19, 1900.]

APPEAL.—*Bill of Exceptions.*—*Mandamus.*—The determination as to what facts should be stated in a bill of exceptions invokes the exercise of a legal discretion, and is, therefore, a judicial act, and hence a superior tribunal cannot compel an inferior tribunal to say what shall go into a bill of exceptions. *p. 105.*

MANDAMUS.—*When Trial Judge Not Compelled to Sign Bill of Exceptions.*—A trial judge will not be compelled by writ of mandate from the Appellate Court to sign, or correct and sign, a bill of exceptions tendered to him, where there is a bill prepared and signed by him in the record, although the bill prepared and signed by him was not signed and filed within the time originally given by the court. *p. 105.*

From the Pulaski Circuit Court. *Application for writ of mandate overruled.*

M. Winfield, H. A. Steis and M. M. Hathaway, for appellants.

M. W. Hopkins, for appellees.

WILEY, J.—Appellants have, in due form, filed an application and motion for an alternative writ of mandate, to issue against the Hon. George W. Beeman, judge of the Pulaski Circuit Court, to require him to show cause, if any he has, why he does not sign a certain bill of exceptions prepared by appellants and tendered to him for signature, within the time fixed by the court for filing such bill, and, if said bill is not correct, that he be ordered to correct the same, etc. The facts upon which the motion and application rest are fully stated therein and are as follows: Appellees commenced, and were prosecuting in the court below,

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a proceeding supplementary to execution against one Allen G. Busick, to which action appellants, as executors of the last will and testament of Joseph W. Busick, deceased, were made parties to answer as to certain funds alleged to be in their hands belonging to said Busick. Appellants appeared to said proceedings, and filed answer, and when the issues were joined the plaintiffs below moved, in writing, for judgment upon the pleadings. After the answer had been filed, and the motion for judgment on the pleadings had been entered, appellants moved for a change of venue from the presiding judge, and supported the motion by an affidavit of appellant Bogue. This motion was overruled by the court, to which ruling appellants excepted, and asked and were granted ten days in which to file their bill of exceptions. The motion for a change of venue was overruled January 24, 1900. On February 2nd, following, appellants prepared their bill of exceptions, embodying their motion and affidavit for a change of venue, the ruling thereon, and their exception, and presented it to the trial judge for signature. On the same day, the judge refused to sign the paper so presented as a bill of exceptions, but indorsed thereon the following: "And now, within the time allowed, the defendants tender this their bill of exceptions and pray that the same may be signed, sealed, and made a part of the record this 2nd day of February, 1900, and not signed as a bill of exceptions because it does not state all the facts. [Signed] Geo. W. Beeman, Judge of the Pulaski Circuit Court." The judge refusing to sign the bill as tendered him, because it did not state all the facts, and he having indorsed on the bill his reason for not signing it, and signing his name thereto, we must hold that appellants did all that the law required of them, and that the judge merely accepted the bill for correction and final signature. The motion and application show that appellants requested that the judge correct the bill, and that he thereupon wrote an amendment to it, whereupon appellants amended said bill

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by adding thereto the amendment prepared by the judge, embodying the same in the original bill, and when said bill was so corrected they again presented it to him with a request that he sign it as a bill of exceptions, which he refused to sign, and gave as an excuse for not signing it that he would prepare one of his own. The motion and application further show that on the 9th of February, 1900, the said judge did prepare a bill of exceptions, embodying the motion and affidavit for a change of venue, the ruling thereon and the exception to such ruling, and took it to the clerk's office and directed the clerk to file it, which was done. This bill of exceptions prepared by the judge appears in the record, and the record shows that it was duly filed. As ten days from January 24th were given in which to prepare and file a bill of exceptions, and as the bill prepared and signed by the judge was not filed till February 9th, it is obvious that it was not filed within the time fixed by the court. It is stated in the motion, and urged in appellants' brief in support of the motion, that, as the bill tendered by appellants was not corrected or amended by the judge and filed, but a new and different bill was prepared by him and filed after the expiration of the ten days given, they are without a legal bill of exceptions, and can not present the errors complained of on appeal. The law recognizes the right to appeal, and the appealing party is entitled to have prepared and to bring to the appellate tribunal a true record, to the end that any reversible errors committed may be corrected. Section 641 Burns 1894, §629 Horner' 1897, provides that "When the record does not otherwise show the decision or grounds of objection thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause; if not true, the judge shall correct, sign, and cause it to be filed without delay. When so filed, it shall be a part of the record; and delay of the judge in signing and filing the same shall not deprive the

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party objecting of the benefit thereof. The date of the presentation shall be stated in the bill of exceptions, and the entry shall show the time granted, if beyond the term, for presenting the same." That a judge who improperly refuses to settle and sign a bill of exceptions can be required to do so by mandate is settled by the decisions in this State, but he can not be directed as to what he shall put into a bill in a case where there is a controversy as to what the bill should contain. The determination as to what facts should be stated in a bill of exceptions invokes the exercise of a legal discretion, and is, therefore, a judicial act, and hence a superior tribunal can not compel an inferior tribunal to say what shall go into a bill of exceptions. Elliott's App. Proc., §516, and authorities there cited. *Jelley v. Roberts*, 50 Ind. 1; High on Ex. Leg. Rem., §§199, 200, 201, 202, 203, 204.

In the bill of exceptions prepared by the judge, and which he caused to be filed, is the following statement: "And within the time allowed, to wit, February 2, 1900, the defendants tendered their bill of exceptions and prayed that the same may be signed, sealed, and made a part of the record, which was not signed as a bill of exceptions for the reason that the same did not contain all the facts, and now on this 9th day of February, 1900, this is signed and sealed and made a part of the record as the bill of exceptions in said cause." Then follows the signature of the judge.

The action of the judge in refusing to correct the bill tendered to him within the time, so that it would speak the truth, and his failure and refusal so to correct and sign the bill so tendered, and to have it filed, can not prejudice the right of appellants in their appeal. When they tendered to the judge, within the time given them, a bill which they believed embraced all the facts, or, as the statute designates it, "a proper bill", they thus discharged the duty cast upon them by the law. They had no power to compel him either to correct or sign it. The statute made it his duty to sign

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it if it were true, and if it were not true it was his duty to correct it and cause it to be filed without delay. If a judge could arbitrarily refuse to sign a bill of exceptions when tendered to him, or to correct and then sign it, litigants would be at his mercy and appeals would be useless, for in a great majority of appeals questions relied upon for reversal can be presented only by bills of exceptions. While it is the history of the courts in this jurisdiction that trial judges have acted honestly and almost universally have given true bills of exceptions to the end that their rulings might fairly and honestly be reviewed on appeal, yet the legislature recognized the fact that it might be dangerous to invest judges with arbitrary power in such matters, and wisely enacted the statute above quoted to protect litigants from any possible harsh and arbitrary action of trial judges.

The bill here signed by the judge, and which appears in the record, imports absolute verity, and though it was not filed within the time given it shows that a bill was tendered within the time, and we must regard this as a corrected bill. Both by the plain language of the statute and the decided cases, the delay of the judge in signing and filing a bill of exceptions, when it has been presented to him within the time given, can not affect the rights of the parties. *Hamm v. Romaine*, 98 Ind. 77; *Robinson v. Anderson*, 106 Ind. 152; *Ohio, etc., R. Co. v. Casby*, 107 Ind. 32; *Vincennes Water, etc., Co. v. White*, 124 Ind. 376; *Wysor v. Johnson*, 130 Ind. 270.

Under the statute and the authorities, there is a bill of exceptions signed by the judge in the record. This bill presents the very question which appellants seek to present in the bill tendered by them, and which they ask this court to require the trial judge to sign, or, if not true, to correct and sign; and as the motion for a change of venue, the ruling thereon, and the exceptions thereto are properly in the record by the bill, the motion and application for an alternative writ of mandate is overruled.

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CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY
COMPANY v. NEFF.

[No. 3,089. Filed April 5, 1900. Rehearing denied June 19, 1900.]

EVIDENCE.—*Personal Injuries.—Mortality Tables.*—A judgment for personal injuries will not be reversed because of the admission of the testimony of a witness as to the expectancy of life at the age of plaintiff based upon the mortality table of a certain life insurance company, where the expectancy given by the witness was less than that given by standard mortality tables of which the Appellate Court takes judicial notice.

From the Montgomery Circuit Court. *Affirmed.*

E. C. Field, W. S. Kinnan, A. D. Thomas and W. T. Whittington, for appellant.

G. S. Harney and J. F. Harney, for appellee.

HENLEY, J.—This was an action commenced by appellee against appellant to recover damages for an injury received by appellee through appellant's negligence. The trial resulted in a verdict and judgment in favor of appellee. It is assigned as error that the lower court erred in overruling appellant's motion for a new trial.

If appellee was free from fault, there would seem to be no question of appellant's liability. Counsel for appellant in their brief say: "The appellee, Neff, was a regular passenger on one of appellant's trains, and was rightfully on the car and in his proper place when injured through appellant's negligence."

The only question discussed under the assignment of error relates to the admission of the testimony of the witness, William W. Morgan. The witness was asked by appellee to testify as to appellee's expectancy of life. We think the witness was shown to be competent to testify upon the subject. He was then asked if he had in his possession life tables of expectancy, and replied that he had the tables of the Northwestern Mutual Life of Milwaukee. Witness was then asked what was the expectancy of life of a

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man sixty years of age as shown by the tables referred to, and answered that it was thirteen and seventeen one-hundredths years. It would have been the proper practice, after witness had shown his competency to testify, to have asked him to state the expectancy of life of a man sixty years of age. In answering, witness could have referred to the tables to refresh his memory.

The court will take judicial knowledge of the United States mortality tables and of other standard tables of the same character. We must then know that appellant was not harmed by the evidence of the witness Morgan. He placed appellee's expectancy at a less number of years than it is placed by the United States mortality tables, the Carlisle tables or North Hampton tables.

The question as to the admissibility of evidence of the expectancy of life is exhaustively treated in the case of *Shover v. Myrick*, 4 Ind. App. 7. Also see *Clark County, etc., Co. v. Wright*, 16 Ind. App. 630.

We find no error for which the judgment should be reversed. Judgment affirmed.

CROSBY ET AL. v PIERCE.

[No. 8,806. Filed June 20, 1900.]

LANDLORD AND TENANT.—Rent.—Payment.—Pleading.—A complaint in an action for the second year's rent due under a gas lease, which, by its terms, shows that there was no rent due for the first year of the tenancy, is not rendered bad by reason of an averment "that the agreed advance payment of rental for the first year * * was duly paid by said defendants at the time said lease was executed."

From the Grant Circuit Court. *Affirmed.*

W. H. Carroll and *G. D. Dean*, for appellants.

O. A. Baker and *O. L. Cline*, for appellee.

HENLEY, J.—This was an action for rent due under a written lease. To the complaint, appellants, the lessees, an-

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swered general denial and payment. There was a trial by jury which resulted in a verdict and judgment in favor of appellee for \$98.46, the amount of rent found to be due appellee under the lease. Appellants unsuccessfully moved for a new trial. It is assigned as error that the lower court erred in overruling appellants' demurrer to appellee's complaint, and that said court erred in its ruling on the motion for a new trial.

It is averred in the complaint that on the 12th day of April, 1893, appellee and appellants entered into a written contract, by the terms of which appellee leased to appellants his farm of eighty acres situate in Grant county, Indiana; that said lease was for the purpose of giving to appellants the exclusive right of drilling and operating for petroleum and natural gas; that it was agreed between said parties that the first year's rental should be paid in advance, and the same was duly paid at the time said lease was executed; that it was provided in said contract that said appellants, Crosby and Lewiss, should complete a well on said leased premises within the first year, or, if they failed so to do, they were to pay appellee for further delay from said time a yearly rental of \$80; that no well was drilled during said first year of said lease, nor during the second year thereof, by reason whereof appellee is entitled to the rental of \$80 for said second year together with interest from the time the same became due. The lease is made a part of the complaint. By its terms there was no rent due appellee for the first year of the tenancy, and we do not understand from the complaint, or from the brief of appellee's counsel, that any such claim is made. The complaint seeks to recover for the rental due under the lease for the second year of the lease, appellants having failed to drill a well as was provided in the contract.

It is argued by appellants' counsel that the complaint and exhibit show upon their face that there is nothing due appellee under the lease. We think counsel are in error. It was

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not necessary to the sufficiency of the complaint that appellee allege the payment of \$80 rental at the time of the execution of the lease. The averment of the complaint as to the payment of the \$80 was as follows: "That the agreed advance payment of rental for the first year, to wit, from the date of the execution of said lease to the 12th day of April, 1894, was duly paid by said defendants at the time said lease was executed." This allegation did not aid the complaint, neither did it render it insufficient. The theory of the complaint is that appellants under the lease owe appellee the annual rental, which by the terms of the lease was to begin one year after its execution. If, in fact, the \$80 paid was paid under the terms of the lease and was intended by the parties to be a payment of the rent accruing thereunder, then the plea of payment presented this issue to the jury, and was by the jury decided adversely to appellants. So far as the averments of the complaint show, the agreement to pay the \$80 in advance, which was paid, was an executed parol agreement which was in no way connected with the lease except that it was contemporaneous with it. There was no error in overruling the demurrer to the complaint.

The questions arising upon the motion for a new trial relate to the sufficiency of the evidence to sustain the judgment. The evidence upon the material point discussed by counsel is sharply conflicting. This court will not weigh the evidence.

Judgment affirmed.

BURKET ET AL. v. MILLER.

[No. 2,829. Filed Nov. 29, 1899. Rehearing denied June 20, 1900.]

INJUNCTION.—Action on Bond.—In an action on an injunction bond, the original proceedings for an injunction will be held to have been discontinued, where it is shown by the evidence that the judgment procured by the plaintiff in the trial court was reversed and the temporary restraining order dissolved on appeal to the Supreme Court, and that the entry of judgment in the order-book of the trial

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court, upon the reversal, was the last step taken in the cause, and that the suit on the bond was not filed until nearly three years had elapsed since the rendition of the judgment, and not until every obligation, the performance of which the bond sued on was intended to secure, had been violated. *pp. 112, 113.*

APPEAL AND ERROR.—*Harmless Error.*—It is not reversible error for the court to sustain demurrers to special answers, where all the evidence which would have been admissible under such answers was admissible under the general denial, also pleaded. *p. 113.*

LANDLORD AND TENANT.—*Action for Possession.*—*Right to Growing Crops.*—A judgment in favor of a landlord for possession does not entitle him to the growing crops. *p. 115.*

From the Howard Superior Court. *Affirmed.*

B. C. Moon and *M. Winfield*, for appellants.

D. C. Justice, *J. C. Blacklidge* and *C. C. Shirley*, for appellee.

HENLEY, J.—This is an action for the recovery of damages upon two injunction bonds executed by appellant Burket as principal. The complaint avers that appellee was on the 30th day of June, 1890, the owner of the undivided one-half of eighty-three acres of growing wheat situated upon certain lands in Cass county, Indiana, which lands are particularly described, and appellee, being in possession thereof, was engaged in cutting and harvesting the same at said time; that on the 1st day of July, 1890, while so engaged in harvesting said wheat, appellant Burket commenced an action against appellee and his sons, who were assisting him in the harvesting, for an injunction and restraining order to prevent and restrain appellee from harvesting the wheat and perpetually to restrain appellee from interfering or disturbing appellant Burket in harvesting said wheat; that in said action appellant procured a restraining order against appellee harvesting said wheat and restraining appellee from interfering with appellant Burket in harvesting the same; that, to procure such restraining order, appellant Burket, as principal, and appellant Charles H. Uhl, as surety, executed a bond to the approval of the

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court; that upon the hearing of said cause, the court continued said restraining order, and from the said judgment appellee appealed to the Supreme Court of Indiana, in which court the judgment of the lower court was, on the 20th day of October, 1892, in all things reversed, and that thereafter the said Burket did not longer prosecute his action, but the same was discontinued by him. It is further charged in the complaint that, immediately upon procuring the restraining order, said Burket went onto the land and harvested said crop of wheat and appropriated it to his own use. Appellee demands judgment for his expenses, attorney's fees, and costs, together with the value of the wheat alleged to have been converted by appellant Burket under the protection of the restraining order.

To the complaint appellants filed their joint and several answers in seven paragraphs. Appellee demurred to the fourth, fifth, sixth, and seventh paragraphs of answer. The demurrer was sustained to the fourth, fifth and sixth paragraphs, and overruled as to the seventh. There was a trial and judgment for appellee.

We will dispose of the questions presented by appellants' assignment of errors in the order in which counsel have argued them. The complaint is not questioned. It is first contended that there is no evidence to sustain the allegation of the complaint that "thereafter the said Burket did not longer prosecute his action but the same was discontinued by him." Conceding, without deciding, that this was a material averment of the complaint, we think there was evidence introduced from which the court could rightfully find that the said averment had been proved. Appellee introduced and read in evidence the papers in the original case of Burket v. Miller. That case was commenced on the 1st day of July, 1890, bond was given, and a temporary restraining order was issued on that day. Upon the hearing, the injunction was continued. An appeal was taken by appellee to the Supreme Court. That court, on the 26th day

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of October, 1892, reversed the judgment of the lower court, the opinion of the Supreme Court in that case concluding as follows: "We find nothing in the complaint sufficient to authorize the granting of an injunction. The judgment is reversed, at the appellees' cost." *Miller v. Burket*, 132 Ind. 469. There was no complaint on file in the Cass Circuit Court sufficient to authorize the granting of an injunction. The lower court, on the 5th day of January, 1893, after the opinion of the Supreme Court had been certified down, rendered judgment in said cause in favor of appellee Miller against appellant Burket as follows: "It is therefore further ordered, adjudged, and decreed by the court that the judgment in this cause be in all things reversed, and that the temporary injunction be dissolved, and that the defendant do have and recover of and from the plaintiff all costs," etc. The certified copy of the order-book entries in the case of *Burket v. Miller*, introduced in evidence, shows that the entry of judgment upon the opinion of the Supreme Court when the same was spread of record was the last step taken in said cause. The complaint in the case at bar was not filed until nearly three years had elapsed after the rendition of the above judgment, and not until every obligation, the performance of which the undertakings sued on were intended to secure, had been violated. These facts all appear in the evidence and are conclusive proof that the injunction proceedings were no longer prosecuted but were by appellant discontinued.

The fourth, fifth, and sixth paragraphs of answer were special denials; the general denial was also pleaded, and all evidence was admissible under the general denial which could have been admitted under these special answers. In such a case, it was not reversible error for the court to sustain demurrers to such answers. *Mason v. Mason*, 102 Ind. 38; *Landwerlen v. Wheeler*, 106 Ind. 523; *Pierce v. Pierce*, 17 Ind. App. 107. The seventh paragraph of answer was also held good by the lower court, and under this paragraph

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of answer any evidence was admissible that might have been admissible under the averments of the answers which were held insufficient. Under the assignment of error that the court erred in overruling the motion for a new trial filed by each of appellants, counsel discuss the admissibility of certain evidence, and the correctness of the instructions given by the court to the jury. It was admitted that a certain exhibit which was set out in the answer is a true copy of the proceedings had before the justice of the peace in the case of Burket v. Boone, and that it may be received as evidence, if competent, the same as if it had been certified here. The appellants then offered the transcript in evidence. Counsel for appellee objected to its admission in evidence because it was irrelevant and did not in any manner tend to prove ownership in appellant of the wheat in question, and that the judgment shown by said transcript did not operate to pass the title of the said wheat to appellant. The lower court sustained the objection and appellant excepted. The transcript of the proceeding and judgment offered in evidence by appellant was the transcript of all the proceedings and judgment in a case brought by appellant Burket against his tenant, Boone, to recover possession of the lands leased him, a part of which lands was the land upon which the wheat in controversy was then growing. The rental contract was made a part of the complaint. The breach of the conditions was alleged and judgment asked for the possession of the premises. Before the day set for trial, an agreement was entered into between the plaintiff and the defendant in said action and filed with the justice before whom the same was pending. This agreement was in the following words: "It is agreed that judgment may go for plaintiff for possession, but no writ is to issue thereon until March 5, 1890. This agreement to be entered on the judgment." The justice then rendered the following judgment: "It is therefore considered and adjudged by the court that the plaintiff, Alvin Burket, do have possession of the real es-

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tate described in his complaint, and it is further ordered by the court that no writ of restitution issue upon this judgment until after the 5th day of March, 1890. Dated February 21, 1890." Appellants' whole defense rests upon this judgment. If the judgment rendered by the justice as above set out, which dispossessed Boone, and gave the possession of the land and the growing crops to appellant, then appellee had no title to the wheat, and he could not be damaged by the taking of the wheat by appellant, because, under appellants' theory of the effect of the judgment, the appellant would be the real owner. As between landlord and tenant it has been universally held in this State that growing crops are personal property. *Cunningham v. Baker*, 84 Ind. 597; *Gordon v. Stockdale*, 89 Ind. 240; *Perry v. Hamilton*, 138 Ind. 271. In the last mentioned case the court said: "The only reason suggested in argument in support of the action of the court in granting an injunction is that the cutting and removing of the stocks would be an injury to the freehold. The reason is unsound, because, as between landlord and tenant, the annual crop constitutes no part of the freehold."

The transcript of the proceedings and judgment, including the agreement entered into between the parties to the suit in the case begun by the landlord for possession, does not show such a judgment as is required to effect a forfeiture and eviction; neither by the complaint nor by the agreement between the parties was such a judgment authorized. The right to the wheat was not in litigation, and was not determined. The question argued by appellants' counsel is squarely determined adversely to appellants' contention in the case of *Sullivan v. O'Hara*, 1 Ind. App. 259, and again in *Collier v. Cunningham*, 2 Ind. App. 254. The instructions given by the court to the jury stated the law applicable to the evidence, and it appears from the whole record that the right conclusion has been reached by the lower court.

Judgment affirmed.

INDIANAPOLIS NATURAL GAS COMPANY ET AL. v.
PIERCE.

[No. 2,958. Filed Jan. 31, 1900. Rehearing denied June 20, 1900.]

LANDLORD AND TENANT.—Lease.—Assignment.—Action by Assignee.

—*Parties.*—Where the assignment of a lease was in writing indorsed thereon, the assignor is not a necessary party in action by the assignee for breach, although the original lease is lost. *pp. 117, 118.*

SAME.—Assignment of Expired Gas and Oil Lease.—Action by Assignee.—Damages.—The assignment of an expired gas and oil lease carries with it the right of action on such lease for damages stipulated for failure of lessee to drill well. *pp. 117, 118.*

APPEAL.—Assignment of Errors.—The correctness of facts found by the trial court is admitted by an assignment of error "that the court erred in its conclusions of law." *pp. 119, 120.*

LANDLORD AND TENANT.—Gas and Oil Lease.—Uncertainty of Description.—Evidence.—In an action to recover upon a covenant of a gas and oil lease for the payment of a specified sum annually upon failure to drill wells, it was not error to admit in evidence the lease on the ground of uncertainty of description, where the land was described as thirty acres of a certain tract "excepting and reserving therefrom twenty acres, more or less, around the buildings, the boundaries of which shall be designated and fixed," and the lessor had designated such boundaries to the lessee's agent at the time the lease was executed. *pp. 119, 120.*

SAME.—Lease.—Assignment.—An expired gas and oil lease, on which there is a stipulated sum due as damages for breach, is a mere chose in action, and not an interest in the land, and an assignment thereof need not be under seal. *pp. 122, 123.*

From the Hamilton Circuit Court. *Affirmed.*

T. J. Kane, R. K. Kane and T. E. Kane, for appellants.
A. F. Shirts, L. S. Baldwin and Geo. Shirts for appellee.

COMSTOCK, J.—Appellee brought this action on a gas lease executed by Isaac B. Anderson and Mary J. Anderson to J. M. Guffy & Co., assigned by said Anderson to appellee and assigned by Guffy & Co. to the Indianapolis Natural Gas Company, and by that gas company to the Indianapolis Gas Company. The cause was put at issue, a special finding

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of facts made by the court upon proper request, on which judgment was rendered in favor of appellee for \$750.

The errors separately assigned by appellants, the Indianapolis Natural Gas Company and the Indianapolis Gas Company, are: (1) That the court erred in overruling the separate demurrers filed respectively by said appellants to the complaint; (2) in its conclusions of law on the facts found; (3) in overruling the motion for a new trial by each of the appellants. The following is a statement of the facts: On the 3rd of May, 1887, I. B. Anderson and Jennie Anderson executed a lease for five years to J. M. Guffy and Company, granting to said Guffy and Company the right to operate, store and transport petroleum oil or gas over and "from all that certain tract of land situated in Washington township, Hamilton county and State of Indiana, bounded and described as follows, to wit: On the north side by the lands of J. Mendenhall, on the east by the lands of S. M. Smith, on the west by the lands of William G. Pierce, on the south by the lands of S. M. Smith, containing thirty acres more or less, excepting and reserving therefrom twenty acres more or less, around the buildings, on said premises upon which there shall be no wells drilled by either parties, the boundaries of which shall be designated and fixed by the party of the first part," reserving therefor the one-eighth part of all oil discovered, and in case gas only was discovered \$100 for each well drilled, and in case no well was drilled \$100 per annum was to be paid; Guffy and Company assigned said lease to the Indianapolis Natural Gas Company who assigned the same to the Union Trust Company of New York and Lafayette Perkins of Indianapolis, who assigned the same to appellant, the Indianapolis Gas Company. After the five years limitation of said lease had expired, said I. B. Anderson and Jennie Anderson assigned a copy of said lease to appellee herein who commenced this action. No well was drilled under the lease, and no rent was paid.

Under the first specification of the assignment of errors,

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counsel for appellants claim that J. M. Guffy and Company, the original lessees, should be made parties defendant. It is alleged in the complaint that J. M. Guffy and Company sold, assigned and transferred the lease to the Indianapolis Natural Gas Company, which company sold and transferred the lease to the Indianapolis Gas Company; that these assignments were in writing indorsed on the original lease, but that a copy of the same could not be given because the lease was lost. Under the averments, Guffy and Company were not necessary parties. §276 Horner 1897. It is insisted in further support of the proposition that the complaint is insufficient, that the assignments of the lease by the lessees gave the assignee (appellee) no cause of action. The assignment is in the following language: "For value received we hereby sell, transfer and assign all our interest, right and title in and to the original contract of which this is a true copy to W. G. Pierce." It is contended by counsel for appellants that as appellee did not own the reversion, or as the land was not conveyed to the assignee, the assignment of the lease would not carry with it rent which had accrued before the assignment; that the right of action on the covenant to pay rent had accrued before the attempted assignment to appellee. In order to pass to appellee the right of action for rent the lessors should have assigned the claim for rent. Appellants cite in this connection: *Allen v. Wooley*, 1 Blackf. 148; *Carley v. Lewis*, 24 Ind. 23; *Junction R. Co. v. Sayers*, 28 Ind. 318; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650.

By the assignment, the Andersons sold whatever right or interest they had by virtue of the contract assigned. The lease is dated May 31, 1887, and was for five years; the right of Guffy and Company and their assigns to enter upon the land expired May 3, 1892. The lease was no longer operative against the land at the time of its assignment to appellee. The Andersons could only look to the agreement contained in the lease whereby it was stipulated that the

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lessees should pay certain sums of money as damages for a failure to put down a well. Parties may stipulate for the amount of damages on account of breach of contract. *Wambaugh v. Bimer*, 25 Ind. 368; *Harrison v. Lockhart*, 25 Ind. 112; *Stanley v. Montgomery*, 102 Ind. 102; *Jaqua v. Headington*, 114 Ind. 309.

A lease may be assigned by the lessor so as to give to the assignee the right to receive rent reserved without a sale or transfer of the reversionary interest. The doctrine of the common law that choses in action are not assignable does not obtain with us. *Ridman & Lyons on Landl. & Ten.* p. 439; *Taylor on Landl. & Ten.* §426; *Willard v. Tillman*, 2 Hill 274. It is averred that the assignment to appellee was made after the expiration of the lease. When the assignment was made to appellee, there was due under the contract in question to the Andersons the amount stipulated therein for the breach of the same. It was a chose in action. They had a right of action under the contract and when they assigned all their rights and interest therein, they assigned this right of action to appellee. The time for which the land was leased having expired, there remained nothing but this right of action to be transferred. To hold that the assignment transferred only the original instrument would be too narrow a construction. The authority cited by appellant is not applicable to the facts in the case at bar.

Appellants' counsel discuss the second specification of the assignment of errors, viz., "that the court erred in its conclusions of law on the facts found," and the first and third reasons for a new trial, together. The first reason for a new trial is because the decision of the court is contrary to law. The third is that the court erred in permitting plaintiff (appellee) to introduce in evidence, over defendants' objection made at the time, the lease contract sued on in the complaint. The court found that "Anderson granted, demised and let unto J. M. Guffy and Company of Pittsburgh, Pennsylvania, for the purpose of drilling and opera-

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ting for oil or gas, a certain tract of land situated in Washington township, Hamilton county, Indiana, and bounded and described as follows, to wit: "On the north by the lands of J. Mendenhall, on the east by the lands of S. M. Smith, on the south by the lands of S. M. Smith, on the west by the lands of William G. Pierce, containing thirty acres more or less; excepting and reserving therefrom twenty acres around the buildings on said premises upon which there shall be no wells drilled by either of said parties the boundaries of which shall be designated and fixed by the party of the first part." That there was no further or different description of said thirty acres nor of the ten acre portion thereof on which it was stipulated the drilling should be done nor of the twenty acres reserved.

The introduction of the lease in evidence was objected to for the reason that the description was so uncertain as to furnish no means of identifying the land to be conveyed, and for that reason was not enforceable. Conceding that the instrument in question was open to the objection, yet the court found, and the exception to the conclusions of law admits the correct finding of the facts: "The court further finds that pursuant to and in accordance with the terms of said contract I. B. Anderson on the 3rd day of May, 1887, and immediately after the parties to said contract had signed the same, but before the acknowledgment of their signatures thereto pointed out to one Scully who was the agent of and acting in the making of said contract lease for said Guffy & Co. the boundary of a portion of said thirty acres described in the contract sued on east of a certain fence extending north and south through the entire width of said thirty acre tract which said east portion contained a little more than ten acres of land, between ten and thirteen acres, and stated that the said east portion thus described was the portion of said thirty acres upon which said company might drill for gas. That said ten acres was to be east of said fence, and that the portion of

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the land west of said fence was the excepted portion upon which no gas wells should be drilled; that at the time the said east portion containing the said ten acres and the west portion, being the exception and containing near twenty acres, were thus pointed out and located, said I. B. Anderson also pointed out to said Guffy & Co. the fences and a railroad that, together with the fence already named and described, formed the boundary of said ten acre portion upon which gas wells might be drilled and at the same time pointed out to said Guffy & Co. an old well in which there was an old pump-stock extending above the ground, as the location near which he wished the first well to be drilled; that the said 'old well' was situated entirely on the said ten acre tract of land some ten or fifteen rods east of said fence; that all the buildings on the said thirty acres were situated on the twenty acres of land thus described as the excepted twenty, and west of the said fence running north and south. That the boundaries of the twenty acres excepted from said grant were not designated in said lease and contract, nor was there any written agreement or memorandum aside from said lease referred to therein fixing the boundaries of said twenty acres reserved and that neither said Anderson nor this plaintiff at any time notified said Guffy & Co. nor any assignee of said lease, including the defendant gas companies that he had designated and fixed the boundaries of the twenty acres reserved and what said boundaries were except as herein found.

"That no other or different description or designation of boundaries than as hereinbefore found was ever given by said I. B. Anderson or his authorized agent to said Guffy & Co., or to either of these defendants, either as to the portion upon which gas wells might be drilled, or as to the excepted portion of said thirty acres described in the said contract."

The court further found that neither Guffy & Co. nor these defendants nor either of them at any time ever asked I. B. Anderson or his authorized agent to more definitely

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describe the boundaries of the said ten acre tract or the excepted portion of said thirty acres described in the said contract nor the location for the first gas well, than was described and defined on the said 3rd day of May, 1887, as herein stated, and further found that pursuant to and in accordance with the terms of said contract the description and boundaries, both of the excepted portion on which no gas wells were to be drilled and the ten acre portion of said thirty acres on which gas wells were to be drilled, and likewise the location for the first gas well to be drilled, were pointed out and described as herein stated and that the acts of the said I. B. Anderson herein stated in locating, pointing out, and describing the two said separate portions and divisions of said thirty acres, and the place where the first gas well was to have been drilled were sufficient under and met the requirements of said contract relative to fixing and designating the boundaries of the two portions and divisions of said thirty acres and in pointing out the location for the first well.

The description of the premises in the lease before us and in the lease in question in *Indianapolis, etc., Co. v. Spaugh*, 17 Ind. App. 683, is identical. It may be said here, as was said in the case last named, "If all the terms of the contract had been complied with, it could not have failed of execution by reason of the imperfect description," for the reason that the lessor designated the boundaries within which the wells were to be drilled and pointed out the location of the first well to be drilled. Under the authority of that case, the lease was properly admitted.

The fourth reason for a new trial was that the court erred in permitting plaintiff to introduce in evidence over defendant's objection the assignment of the contract sued on from Anderson to plaintiff. The objection is made that the lease purports to pass an interest in real estate, was for a period of more than three years, "could only be assigned by deed, subscribed, sealed and acknowledged"; also for the reason

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that the lease upon which the assignment was formed contained no description of the land attempted to be conveyed; citing §§2919, 4925 Horner 1897.

The interest conveyed by this assignment was a mere chose in action; it had ceased to operate as an interest in real estate. As to the sufficiency of the description, what we have said as to the description of the real estate contained in the lease in passing upon the third reason for a new trial applies to the fourth reason. The second reason for a new trial was that the decision of the court is not sustained by sufficient evidence. An examination of the record discloses that the decision of the court was sustained by the evidence, and that a correct result was reached. We find no error for which the judgment should be reversed.

Judgment affirmed.

Henley, J., and Robinson, J., dissent.

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[No. 3,058. Filed June 21, 1900.]

CRIMINAL LAW.—Former Conviction.—Disturbing Public Meeting.—

An affidavit charging that on a certain day defendant "was found disturbing the peace in a certain public at Bethana Church in Greene county, State of Indiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana," does not state any criminal offense, and a conviction based thereon is no bar to a subsequent prosecution for disturbing a public meeting.

From the Greene Circuit Court. *Reversed.*

W. L. Taylor, Attorney-General, *C. D. Hunt*, *Merrill Moores* and *C. C. Hadley*, for State.

A. G. Cavins, *W. L. Cavins* and *C. E. Henderson*, for appellee.

ROBINSON, C. J.—Appellee was indicted under §2074 Burns 1894, for disturbing a meeting. He pleaded in bar a former conviction for the same offense. The only question

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presented is whether the following affidavit charges a public offense. "State of Indiana Before me W. P. Barker a justice of the peace for said county one Harvey F. Ferguson who being duly sworn according to law deposeth and sayeth that on or about the 30th day of July 1898 Milton Bogard was found disturbing the peace in a certain public at Bethana church in Greene county and State of Indiana contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

A former conviction may be a bar to a subsequent prosecution although it was not had upon a formally sufficient charge. A defective charge may sustain a former conviction. *Fritz v. State*, 40 Ind. 18; *State v. George*, 53 Ind. 434; *Greenwood v. State*, 64 Ind. 250.

But the distinction must be kept in view between an affidavit which states a charge defectively, and an affidavit which does not state any charge. The affidavit in question does not state any criminal offense known to our system of criminal jurisprudence. It was attempted to be drawn under §2074 Burns 1894, but a reading of that section at once discloses that it does not in any way comply with the provisions of that section. The conclusion is stated that appellant was disturbing the peace at a certain time and place, but it is not shown what he was doing, whether anyone else was present, whether his offensive conduct, if any, disturbed or molested any collection of any inhabitants of this State convened for any purpose mentioned, or for any lawful purpose. As the former conviction was not upon any charge known to the law as a criminal offense it can not be a bar to any subsequent prosecution. The judgment rendered by the justice was a nullity. *Davidson v. State*, 99 Ind. 366; *Shepler v. State*, 114 Ind. 194; *Ford v. State*, 7 Ind. App. 567.

The appeal is sustained.

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TURK v. CARNAHAN ET AL.

[No. 8,170. Filed June 21, 1900.]

SALES.—Title to Remain in Seller.—Remedy of Seller Upon Default.—

A seller of property, who retains the legal title in himself, cannot, upon default of payment, take possession of the property, sell or otherwise dispose of it, and then sue the purchaser for the balance of the purchase price.

From the Daviess Circuit Court. *Reversed.*

W. R. Gardiner and *C. G. Gardiner*, for appellant.

P. R. Wadsworth and *W. Q. Williams*, for appellees.

WILEY, J.—Appellant purchased of appellees certain personal property under an agreement that the title should remain in them until the full purchase price was paid. Notes were executed for the purchase price, and the note in suit was given in lieu of the original notes, after default in payment had been made and upon an extension of time being given. The complaint avers the execution of the note, that it is due and unpaid, and that a reasonable attorney's fee would be \$10.

The note sued on describes the property, and contains a clause that the title to the property shall remain in appellees till it is paid for. The case was put at issue and tried by the court, resulting in a general finding and judgment for appellees. Appellant's motion for a new trial was overruled, and he has assigned error: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the court erred in overruling the motion for a new trial. Some argument is made that the complaint does not state a cause of action, but we are of the opinion that the complaint is sufficient to withstand a demurrer. The motion for a new trial was based upon two grounds, viz., (1) that the finding is not sustained by sufficient evidence, and (2) that it is contrary to law.

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Upon all material questions of fact, the evidence is in no wise conflicting. The evidence shows that appellant executed the note sued on in payment of a buggy, a sewing-machine, and a binder, which he agreed to purchase of appellees. The property was purchased at different times, and separate notes were executed, all of which were similar to the one sued on, except as to the amounts and dates. Appellant paid upon the three notes about \$70, and when they matured he was unable to pay the balance due. Appellees then requested him to execute a new note for the amount of the balances due on the three notes first executed, and he agreed to do so, and thereupon executed the note in suit. Appellant did not ask for additional time in which to pay the first three notes, but told appellees that he was unable to pay them. After the note in suit matured, appellees sent their agent, one Vance, to collect it, and appellant informed him that he was unable to pay it. Vance then told him that he would have to take possession of the property for which the note was given. Before this, however, the binder described in the note had been sold by consent of appellees for \$15, and the amount had been credited on the note. Before the note in suit matured, appellant had exchanged or traded the buggy described in the note for another buggy, a better and newer one, upon the express condition that appellees should not object to the exchange. Appellant told Vance of said exchange, and offered to go and get the buggy he purchased of appellees and to turn it over to them, and Vance informed him that the one traded for was all right and would do just as well. Vance asked appellant to execute a chattel mortgage on his horses to secure the balance due on the note, which he refused to do. Vance thereupon took the buggy and sewing-machine and gave a receipt therefor, which stated that the property was to be applied upon the note in suit. Appellant also signed the following statement: "This is to certify that John Turk has turned over one Standard sewing-machine and one Haydock buggy to C. Vance for M. J. Carnahan & Company, to be applied on my note of

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\$129, note number 2,500; also second-hand Milwaukee binder. [Signed] John Turk.”

Appellees did take possession of said property, and never returned or offered to return it to appellant. When Vance took possession of the buggy, he removed therefrom the name-plate of the makers, and told appellant that appellees had plenty of their own name-plates and would put one of them on. Appellant called several times on appellees and demanded the surrender of his note, and was refused. At one time, when appellant demanded the surrender of the note, one of the appellees asked him how they should sell the property, whether at auction or at private sale, and he told them he did not care. Vance testified that when he took the property from appellant, he (appellant) agreed that appellees should take the property and sell it and apply the proceeds on the note; but on cross-examination he admitted that the agreement to which he referred was the one in writing, which is above copied in full. Upon these facts, counsel for appellant maintain in an able brief, that there can be no recovery against their client. It is important, therefore, clearly to understand the legal import of the contract expressed in the note, and the construction that courts have put upon such contracts. The contract sued on is a conditional one. The condition is that the title to the property sold, as described in the note, shall remain in the vendors (appellees) until the purchase money is fully paid. The title to the property never passed from appellees, and therefore never vested in appellant. Contracts of this character have long been held valid. The rule is so familiar that further discussion is useless. *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58; *Payne v. June*, 92 Ind. 252; *Coe v. Johnson*, 93 Ind. 418; *Sinker, Davis & Co. v. Green*, 113 Ind. 264; *Green v. Sinker, Davis & Co.*, 135 Ind. 434.

Upon default of the vendee to pay, as provided in the contract, the vendor has two remedies: (1) He may retake the property, which is a disaffirmance of the sale, or (2) he may treat the sale as absolute, and bring an action for the

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price. 6 Am. & Eng. Ency. of Law (2nd ed.) 480; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446, 18 L. R. A. 187; *Fleury v. Tufts*, 25 Ill. App. 101; *George v. Swafford*, 75 Iowa 491, 39 N. W. 804; *Munroe v. Williams*, 35 S. C. 572, 15 S. E. 279; *Bensinger, etc., Co. v. Cain*, 4 Tex. App. 499, 18 S. W. 136; *Smith v. Barber*, 153 Ind. 322; *Green v. Sinker, Davis & Co., supra*; *Sinker, Davis & Co. v. Green, supra*.

The undisputed facts in this case show that appellees elected to disaffirm the contract, and took possession of the property described in the note. Having asserted their right to disaffirm the contract, and having taken possession of the property under such disaffirmance, appellees thereby abandoned their right to treat the sale as absolute and sue for the price. The law will not permit a vendor of property, who retains the legal title in himself to take possession of it upon default of payment, sell, or otherwise dispose of it, and then sue the vendee for the balance of the purchase price. The authorities are numerous and harmonious upon this proposition. *Thomason v. Lewis*, 103 Ala. 426, 15 South. 830; *McRea v. Merrifield, supra*; *Parke, etc., Co. v. White River, etc., Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing, supra*; *Crompton v. Beach, supra*; *Bailey v. Hervey*, 135 Mass. 172; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Johnson, etc., Co. v. Missouri, etc., R. Co.*, 52 Mo. App. 407; *Heller v. Elliott*, 44 N. J. L. 467; *Heller v. Elliott*, 45 N. J. L. 564; *Morris v. Rexford*, 18 N. Y. 552; *Seanor v. McLaughlin*, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Merchants, etc., Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565; *Parlin, etc., Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084; *Green v. Sinker, Davis & Co.*, 135 Ind. 434; *Sinker, Davis & Co. v. Green*, 113 Ind. 264; *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 287; *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373.

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In the case of *Green v. Sinker, Davis & Co., supra*, appellees delivered to appellant certain personal property under an agreement that the title thereto was to remain in appellees until it should be paid for. Appellant paid \$100 in cash, and executed three notes for \$200, maturing at different dates. All of the three notes matured, and appellant only paid thereon \$40. Appellees were pressing appellant for payment, and to obtain an extension of time in which to make such payment it was agreed that appellant should execute a note of \$200, secured by chattel mortgage on other property, to be held as additional security for the three notes originally executed, and that if such note should be paid, such payment would be credited upon the original notes, and that as consideration for such additional security appellees would extend the time of payment of the three notes. The time of extension expired, and no further payments were made. Appellees took possession of the property sold, and sought to collect the note and mortgage given as collateral security, they having surrendered the three notes representing the unpaid purchase price of the property. It was held that as the last note was given as collateral security for the purchase money, appellees could not disaffirm the sale and enforce collection of unpaid purchase money.

It seems useless further to pursue the discussion. When appellees took possession of the property, as they had a right to do under the contract, they exhausted their remedy. They elected their own remedy, and, if their election was unwise, we can not relieve them. Giving the evidence the most favorable construction that can be put upon it, it wholly fails to sustain the finding and judgment. It follows, therefore, that the finding is not sustained by sufficient evidence, and is contrary to law. The judgment is reversed, and the trial court is directed to grant appellant a new trial.

• INGALLS v. BISSOT.

[No. 3,224. Filed June 21, 1900.]

LANDLORD AND TENANT. — *Lease.* — *Rent Payable in Advance.* — *Notice to Quit.* — *Demand for Rent.* — Where a tenant from month to month by the terms of his lease is to pay his rent in advance, it is not necessary, in an action for possession for failure to pay rent when due, to prove notice to quit or a demand for the rent.

From the Lawrence Circuit Court. *Affirmed.*

J. H. Smith and *W. H. Consalus*, for appellant.

J. E. Boruff and *J. H. Underwood*, for appellee.

BLACK, J.—This was an action commenced before a justice of the peace by the appellee against the appellant for the recovery of the possession of certain premises held by the appellant as the appellee's tenant from month to month, the rent, by the terms of the contract, being payable in advance, and the tenant having neglected to pay the rent for the current month.

In the discussion of the action of the court below in overruling the appellant's motion for a new trial, it is contended for the appellant that to maintain the action it was necessary to prove notice to quit and a demand for the rent.

Our statute relating to landlord and tenant §7088 *et seq.* Burns 1894, §5207 *et seq.* Horner 1897, provides what notice may be available to terminate estates at will, tenancies from year to year, and all tenancies which by agreement of the parties, express or implied, are from one period to another of less than three months' duration; and it is provided that if a tenant neglect or refuse to pay rent when due, ten days notice to quit shall determine the lease, when not otherwise provided therein or agreed to by the parties, unless such rent be paid at the expiration of said ten days. It is further provided, that where the landlord agrees with

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the tenant to rent the premises to him for a specified period of time; or where the time of the determination of the tenancy is specified in the contract; or where a tenant at will commits waste; or in the case of a tenant at sufferance; or where, by the express terms of the contract (as in the case at bar) the rent is to be paid in advance, and the tenant has entered, and refuses or neglects to pay the rent; and in any case where the relation of landlord and tenant does not exist—no notice to quit shall be necessary. In either of such cases, the owner of the premises is entitled to recover possession without notice to quit.

It is also provided by §7106 Burns 1894, §5225 Horner 1897: "Whenever, in pursuance of legal notice, or otherwise, any landlord or his legal representative shall be entitled to possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over removed from such lands, on complaint before a justice of the peace of the county in which such lands lie, specifying the matters relied on to justify such removal and the damages claimed for detention, describing the premises with reasonable certainty."

The case before us is such a proceeding, the plaintiff being entitled to possession by reason of the failure of the tenant to pay rent in advance, and such failure being specified as the matter relied on to justify the removal of the tenant.

The recital of the statutory provisions would seem to be a sufficient reply to the appellant's claim in argument.

By the express provision of the statute, the notice to quit necessary to determine the lease in the case of a tenant neglecting or refusing to pay rent due, but not by the terms of the contract payable in advance, was not necessary in the case at bar. The failure to pay the rent in advance was all that was needed to entitle the landlord to treat the lease as determined and to bring his proceeding for the removal of the tenant as one unlawfully holding over after the termina-

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tion of the tenancy, as may be done when the time for the determination of the tenancy is specified in the contract and the tenant is unlawfully holding over after its expiration, or as may be done in the other instances wherein it is provided, as above stated, that no notice to quit shall be necessary.

The failure to pay the rent in advance, as expressly agreed, has, under the statute, the effect that would accrue upon the termination of the period specified in a notice to quit in a case wherein under the statute a tenancy may be terminated by such notice, or by such notice and failure to pay rent at the expiration of the period of notice.

An action for the recovery of any rent due might be maintained without previous demand; and a demand for rent was not needed for the purpose of forfeiting the lease. Under the provisions of the statute the lease was determined, and the holding over of the lessee was rendered unlawful, by the mere neglect to pay the rent in advance. See, *McNatt v. Grange Hall Assn.*, 2 Ind. App. 341; *Thomas v. Walmer*, 18 Ind. App. 112.

Judgment affirmed.

WILLIAMS v. RESENER, ADMINISTRATOR.

[No. 3,080. Filed March 27, 1900. Rehearing denied June 21, 1900.]

TRIAL.—Practice.—When Duty of Court to Direct Verdict.—It is the duty of the trial court to direct a verdict in cases where there is an entire failure of proof as to any material fact, the establishing of which is necessary to the cause of action or defense. *p. 133.*

PARENT AND CHILD.—Services of Child After Majority.—Liability of Parent.—Failure of Proof.—In an action by a daughter against the administrator of her father's estate for services rendered her father as housekeeper after she became of age, it is proper for the trial court to direct a verdict for defendant where the evidence failed to show an express or implied contract to pay for such services. *p. 134.*

From the Marion Superior Court. *Affirmed.*

W. W. Spencer and *E. P. Ferris*, for appellant.

W. N. Harding, *A. R. Hovey*, *W. Bosson* and *J. C. Ruckleshaus*, for appellee.

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HENLEY, J.—Appellant was the plaintiff below. Her claim is for work and labor done as a housekeeper for decedent. The relationship existing between appellant and appellee's decedent is that of father and daughter. There were two paragraphs of appellant's complaint, the first based upon an implied contract and the second upon an express contract to pay for the services rendered. There was a trial by jury. At the conclusion of the evidence, appellee moved the court to instruct the jury to return a verdict in his favor, which motion the court sustained, and thereupon instructed the jury to return a verdict in favor of appellee. To the action of the lower court in so instructing the jury the appellant at the time objected and excepted, and has properly assigned such ruling as a reason in her motion for a new trial. The only error assigned in this court is the overruling of appellant's motion for a new trial. Under the assignment appellant's counsel discuss the one question as to whether the court properly instructed the jury to return a verdict in favor of appellee.

It is settled law in this State that it is not only the right but the duty of a trial court to direct a verdict in cases where there is an entire failure of proof as to any material fact the establishing of which is necessary to the cause of action or defense. A judge should not submit a question to the jury where their verdict, if contrary to his views of the evidence and its legal effect, would be set aside as against the law and the evidence. *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. 261; *Gipe v. Cummins*, 116 Ind. 511; *Hall v. Durham*, 109 Ind. 434; *Carver v. Carver*, 97 Ind. 497; *Adams v. Kennedy*, 90 Ind. 318; *Wabash R. Co. v. Williamson*, 104 Ind. 154; *Hynds v. Hays*, 25 Ind. 31; *Dodge v. Gaylord*, 53 Ind. 365; *Steinmetz v. Wingate*, 42 Ind. 574; *American Ins. Co. v. Butler*, 70 Ind. 1.

The case of *Faris v. Hoberg*, *supra*, presents a masterly review of the authorities. The rule as herein stated is in that case reaffirmed, with the further statement of law that

the same duty devolves upon the trial court to direct a verdict where the evidence of the defendant entirely answers and overthrows that of the plaintiff not leaving him a *prima facie* case.

Under the issues in this case, it was incumbent upon appellant to produce some evidence to support a contract, express or implied, between appellant and her deceased father that she was to be paid for her services. The recognized rule in such cases is that, when a child after reaching majority resides with the parent as a member of the family, and renders services for the parent, the law does not imply an obligation to pay for such services; on the contrary, the presumption is that no compensation as wages is intended. An express contract to pay will render the parent liable, and an implied contract to pay a reasonable compensation may be inferred from facts and circumstances which tend to rebut the presumption arising from such a relation. *Collins v. Williams*, 21 Ind. App. 227; *Hill v. Hill*, 121 Ind. 255; *McCormick v. McCormick*, 1 Ind. App. 594; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280; *Fuller v. Fuller*, 21 Ind. App. 42; *James v. Gillen*, 3 Ind. App. 472; *Hilbish v. Hilbish*, 71 Ind. 27; *Botts v. Fultz*, 70 Ind. 396; *Davis v. Watts*, 90 Ind. 372; *Brown v. Yaryan*, 74 Ind. 305; *House v. House*, 6 Ind. 60; *Adams v. Adams*, 23 Ind. 50; *Smith v. Denman*, 48 Ind. 65; *Hays v. Steward*, 24 Ind. 352; *Cauble v. Ryman*, 26 Ind. 207. Many cases of this kind have been reversed by the Supreme Court of this State because of the insufficiency of the evidence to establish a contract to pay for the services rendered. *Brown v. Yaryan*, *supra*; *Webster v. Wadsworth*, 44 Ind. 283; *Resor v. Johnson*, 1 Ind. 100; *Oxford v. McFarland*, 3 Ind. 156.

In the case at bar, the evidence wholly fails to show the existence of an express contract to pay for the services rendered. The surrounding circumstances as shown by the evidence excluded any other inference than that the parties intended that the family relation should exist. No evidence

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was produced from which a contract, either express or implied, could be reasonably inferred. The lower court properly instructed the jury to return a verdict for appellee.

Judgment affirmed.

MANKEDICK ET AL. v. THE CONSOLIDATED COAL AND LIME COMPANY.

[No. 8,164. Filed May 17, 1900. Rehearing denied June 21, 1900.]

BOND. — Action. — Pleading. — A contract with a city for certain sidewalk improvements provided that the work should be completed at a specified time. The bond given to secure the performance of the contract stipulated that any extension by the city of the time for the completion of the work should in no way release the sureties on the bond. The work was not completed within the time specified, but upon its completion it was approved and accepted by the city. *Held*, in an action on the bond by a material man for the value of materials furnished the contractor at a time subsequent to the time named for the completion of the work, that it was not necessary for the complaint to aver an extension of time by the city, and that there need be no finding of such extension other than that the work had been completed under the contract and accepted.

From the Marion Superior Court. *Affirmed.*

W. W. Spencer and *E. P. Ferris*, for appellants.

L. D. Hay and *J. W. Bowlus*, for appellee.

COMSTOCK, J.—Appellee (plaintiff below) sued appellants upon a bond executed by them to secure the performance of a written contract entered into by Charles H. F. Mankedick with the city of Indianapolis for paving certain sidewalks in said city. A stipulation of the contract was in the following language: "Said party of the first part hereby agrees to pay any and all moneys due to any contractor or to any person or persons furnishing any material whatever and to pay any laborers employed for any work done in the prosecution of said improvement." The written contract and the bond were executed on the 11th day of September, 1896. By the terms of the contract, the appellant Manke-

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dick agreed to complete said work "by November 15, 1896". The following were the conditions of the bond: "The conditions of the above obligation are such that if the above named party of the first part (Mankedick) shall faithfully comply with the foregoing contract made and entered into September 11, 1896, with the city of Indianapolis, Indiana, and shall fulfil all the conditions and stipulations therein contained, according to the true intent and meaning thereof in all respects, then this obligation to be void; otherwise to be and remain in full force and virtue in law. And in the event the city shall extend the time for the completion of said work, such extension shall not in any way release the sureties on this bond."

It is averred that in the execution of the contract, and the completion of the improvement, defendant Mankedick purchased of the plaintiff necessary material to be used in the work, and that the same was used by him in the completion of the improvement; that the fair value of said material was \$449.89, and which remains due and wholly unpaid. A bill of particulars of the articles furnished was filed as an exhibit with the complaint. It was alleged that the work had been completed to the approval and acceptance of the city civil engineer and the board of public works of said city, and that the assessment roll therefor was done and completed upon the 16th day of July, 1897.

Defendants separately answered (1) by general denial, and (2) payment. For third paragraph Rankin separately answers that the plaintiff is not the real party in interest. In a fourth paragraph, Rankin answered that there was no consideration for the contract "on which plaintiff seeks to recover as between plaintiff and this defendant, Henry Rankin." To these paragraphs of answer appellee replied by general denial. At the request of appellants the court made a special finding of facts and stated conclusions of law thereon. Upon the conclusions of law judgment was rendered in favor of appellee against the defendants for \$350.

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Appellants severally assign errors as follows: The court erred (1) in overruling the separate and several demurrers to the complaint; (2) in overruling the separate and several motions for a new trial; (3) that the court erred in the conclusions of law as excepted to by Henry Rankin.

In support of the first specification of errors, it is insisted that the complaint is defective because it does not show that the city extended the time for the completion of the work. Counsel claim that such showing is necessary because the work was to have been completed by the 15th day of November, 1896, and that the articles for which it is sought to hold appellants liable were not furnished until June, 1897, a period beyond the time at which Rankin as surety had contracted to be bound. This bond provided that an extension of the time should not release the surety. Whether the extension should be made verbally, or in writing, is not stated; so the extension could be granted in either form. The objection is not well taken, because the surety contracts to be bound for the faithful performance upon the part of his principal of the contract, whether he completed the work by the 15th of November, 1896, or was given further time. For this reason no allegation that the time had been extended was necessary.

The complaint proceeds upon one definite theory, and we need not, therefore, refer to the numerous authorities cited by counsel for appellant to the effect that the pleader is held to one definite theory.

There are three reasons given in the motion for a new trial, viz., the special findings of facts are contrary to the evidence, are not sustained by the evidence, and are contrary to law. Counsel for appellants do not discuss these reasons, but an examination of the record shows that the special findings of facts are fully sustained by the evidence.

It is insisted by counsel for appellants that the third specification of error, that the court erred in its conclusions of law, should be sustained, because there is no special find-

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ing that the time for the completion of the work had been extended. The contract in question was with the city to do certain work; the bond was given to secure its performance and the payment by Mankedick for the labor performed and the material used in the work. The bill of particulars informed appellants as to the items and amount of damages claimed on account of the breach, but is not the basis of the action. While the contract named the time for the completion of the work, the bond executed at the same time, and which must be considered with the contract, provided in advance for an extension of the time. It is specially found that the work was commenced in the fall of 1896; that it was completed under the contract and accepted by the city authorities on the 10th day of July, 1897. All the material allegations of the complaint are found to be true. Had a material change been made in the terms of the contract not provided for either in the bond or contract, without the consent of the surety, such change would have released the surety. Counsel for appellants cite many authorities in support of this principle of law. But the only change made was stipulated for in the bond. See *Higgins v. Quigley*, 23 Ind. App. 348, and authorities there cited.

Judgment affirmed.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v.
GRIFFIN ET AL.

[No. 2,730. Filed May 24, 1899. Rehearing denied June 22, 1900.]

COVENANTS.—Of Railroad Company to Maintain Fence.—A covenant of a railroad company to maintain a fence along right of way runs with the land. pp. 141, 142.

RAILROADS.—Covenant to Fence Right of Way.—Breach.—Damages.—Diminution of Rental Value.—For breach of covenant to fence a right of way, such covenant having been made by a railroad company prior to the act of April 13, 1885 requiring railroad companies to fence rights of way, a landowner over whose farm the road is laid may recover as damages the diminution of the rental value of the farm caused thereby. *Henley and Wiley, JJ., Dissent.* pp. 146, 147.

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EVIDENCE.—*Cross-Examination.—Questions of Argumentative Character.*—Upon cross-examination of a witness, questions of a merely argumentative character which did not call for facts nor for opinions based upon facts within the knowledge of the witness or hypothetically assumed were improper, and the answers to such questions were rightly excluded. pp. 148, 149.

RAILROADS.—*Action for Breach of Covenant to Fence Right of Way.*

—*Instructions.*—In an action against a railroad company for damages for the diminution of the rental value of lands caused by breach of covenant to fence its right of way, it is not error to refuse to instruct the jury that one other particular kind of loss, which might have been made the basis of damages, under another form of complaint, was not to be taken as a measure of damages. pp. 149, 150.

SAME.—*Breach of Covenant to Fence Right of Way.—Damages.*—

Rental Value of Land.—Where the rental value of land was depreciated by breach of a covenant on the part of a railroad company to maintain a fence, the covenantee may recover therefor whether or not the lands were actually rented or offered for rent. pp. 150, 151.

From the Henry Circuit Court. *Affirmed.*

W. E. Hackedorn, J. B. Cockrum, E. H. Bundy and W. A. Brown, for appellant.

M. E. Forkner and D. W. Chambers, for appellees.

BLACK, J.—The complaint of the appellees, John W. Griffin and William L. Cory, against the appellant, a demurrer to which for want of sufficient facts was overruled, showed that on a day not stated, in June, 1881, the New Castle and Rushville Railroad Company had located the center of its right of way on the line dividing the east one-half of a certain quarter section of land in Henry county, Indiana, from the west one-half thereof, and for the purpose of its right of way desired to purchase a strip of land two rods in width off the east side of said west one-half; that the appellee Griffin was then the owner in fee of said west one-half, it being an improved and cultivated farm of said Griffin, and he and the said New Castle and Rushville Railroad Company then entered into an agreement, whereby the former sold, conveyed, and transferred to the latter, by a

good and sufficient deed, said strip of land, and said railroad company, as the sole consideration of said conveyance, agreed by and in said deed to build and perpetually maintain on the line dividing the right of way conveyed from the residue of said Griffin farm a good and sufficient fence against all hogs, cattle, horses, sheep, and other stock of every description; that said deed, on said day, after having been duly executed, was delivered to said railroad company by said Griffin, but that said railroad company and its successors had failed and refused to record it, and the appellees had no copy thereof, and were therefore unable to set out the same or a copy thereof as an exhibit; that by *mesne* conveyances from said New Castle and Rushville Railroad Company the appellant had succeeded to all rights and obligations, including the obligation to build and perpetually maintain said fence, of said New Castle and Rushville Railroad Company, and was the owner, and since January 1, 1891, had been managing and operating said railroad; that said New Castle and Rushville Railroad Company and all subsequent owners, including the appellant, had failed and refused to build and maintain said fence, although often requested by the appellees; that said Griffin had continued to be the owner, in whole or in part, of said land from the date of the execution of said deed to the commencement of this action; that on the 1st of January, 1895, he sold and conveyed by good and sufficient warranty deed to the appellee Cory the undivided one-half of said one-half quarter, and since that time the appellees had been the owners of said lands as tenants in common; that at the time of said conveyance said Griffin also sold and conveyed to said Cory all rights in all covenants running with said land, and especially under the deed conveying right of way to the New Castle and Rushville Railroad Company, that on the 26th of April, 1897, said Griffin sold, transferred, assigned, and set over to said Cory the undivided one-half of all rights of action then held by him against the appellant growing out of the violation by it of the condition and stipulation con-

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tained in said deed in respect to building and maintaining a fence along the right of way; that by reason of appellant's failure to build and maintain said stock-proof fence from the 1st of January, 1891, up to the filing of the complaint herein, being the 27th of April, 1897, the rental value of said land had been greatly reduced, to wit, in the sum of \$75 per year, to the damage of the appellees \$450; wherefore, etc.

The appellant objects to the complaint "for the reason that the only damage shown by it to have been sustained by the plaintiff by reason of a failure to repair the fence consists of an alleged 'reduction or diminution in the rental value of the whole tract of land.'"

The question as to whether or not there may be a recovery for such damage as stated in the complaint is not conclusively settled by former decisions authorizing a recovery in such cases for the killing of animals, injury to crops, expense of building or repairing the fence, etc., in which diminution of rental value was not alleged in pleading or shown in evidence. The fact that certain injuries specified have supplied the measure of damages in particular cases in which such injuries were shown to have occurred as the result of breach of the contractual duty does not necessarily lead to the conclusion that the measure may not be supplied by other injuries arising from such cause, being natural results of such breach of obligation or such effects thereof as may be reasonably supposed to have been contemplated by the parties when the duty was assumed.

In *Lawton v. Fitchburg R. Co.*, 8 Cush. 230, where the measure of damages was the cost of erecting the fences according to the agreement, it was said that if the plaintiff had proved injury to his lands from want of the fences, on which no evidence was offered, another question might have been raised.

The covenant shown in the complaint is one which runs with the land. It binds the appellant, the successor of the

railroad company to which the right of way was granted and by which the covenant to construct and maintain the fence was made, and it operates in favor of the appellees, one of them being the covenantee still retaining part ownership of the land and the other being the grantee and assignee of the covenantee and his cotenant. *Toledo, etc., R. Co. v. Cosand*, 6 Ind. App. 222; *Lake Erie, etc., R. Co. v. Power*, 15 Ind. App. 179; *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. 189; *Lake Erie, etc., R. Co. v. Priest*, 131 Ind. 413; *Huston v. Cincinnati, etc., R. Co.*, 21 Ohio St. 235.

In *Chicago, etc., R. Co. v. Barnes*, 116 Ind. 126, it was held that a railroad company is bound to pay for animals killed by its trains in cases where the animals enter upon the track through the fault of the company in failing to fence a crossing in accordance with the terms of the contract.

In *Logansport, etc., R. Co. v. Wray*, 52 Ind. 578, in the contract for the right of way the railroad company agreed to pay the landowner a certain sum per acre for the land appropriated, and to build and construct a good and sufficient fence on each side of the railway across the land, and to build and construct two good and sufficient farm crossings. The complaint alleged failure to pay and failure to construct the fence and crossings, and stated generally that the plaintiff was damaged in a certain sum. An instruction was approved whereby the court stated the measure of damages to be the cost of constructing the fences, the cost of putting in cattle-guards and farm crossings, and the amount per acre specified in the contract.

In *Indiana, etc., R. Co. v. Adams*, 112 Ind. 302, it was held that there is a right of action to recover the amount which it would fairly cost to erect such fences as the contract called for, together with any special damages which the plaintiff may have sustained.

In *Louisville, etc., R. Co. v. Power*, 119 Ind. 269, the court adhered to the rule, that "for the breach of a contract

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by a railroad company with a landowner to fence its right of way, the cost of erecting the fence and also special damages for animals killed, for damage done by trespassing animals, and for the loss of pasturage, may be recovered."

In *Toledo, etc., R. Co. v. Cosand*, 6 Ind. App. 222, it was held that in such case the owner of the land was entitled to recover for being deprived of the use of a pasture, and for being deprived of the use of a passageway which the company covenanted to make, and that evidence of the character and condition of the land was proper to aid the jury in arriving at the correct amount of damages by reason of loss of crops and pasturage.

In *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719, the deed of conveyance of the right of way recited that it was made upon the consideration of a certain sum and that the railroad company covenanted to make a stock pass and a farm crossing and to fence the strip and to locate and maintain a depot on the land. The breaches alleged were failure and refusal to establish and maintain a depot and failure and refusal to erect and maintain fences. The damages assessed included (1) the cost of erecting the fence, (2) damages for failure to erect the fence, embracing certain amounts for hogs killed, loss of pasture for three years, and loss from trespassing animals, and (3) an amount for failure to erect and maintain a depot.

In *Emmons v. Minneapolis, etc., R. Co.*, 35 Minn. 503, 29 N. W. 202, it was held that under a statute providing that for failure or neglect to fence its railroad, etc., the company should be liable for "all damages sustained by any person in consequence of such failure or neglect," damages might be recovered for injury done to a farm by rendering it less fit for pasturing cattle, in consequence of failure of the company to fence its road as required by the statute. The court did not decide upon the measure of damages. On a subsequent appeal in the same case, *Emmons v. Minneapolis, etc., R. Co.*, 38 Minn. 215, 36 N. W. 340, it was held

that the diminution in the rental value of the farm from such cause was a proper measure of damages, and that such damages were not necessarily limited to what it would cost to build a fence.

The same court, in *Nelson v. Minneapolis, etc., R. Co.*, 41 Minn. 131, 40 Am. & Eng. R. Cas. 234, adhered to the former decisions, and said, concerning rental value, that it "is but another form of saying 'the value of the use,' and means simply the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry." See, also, *Emmons v. Minneapolis, etc., R. Co.*, 35 Minn. 503, 46 Am. & Eng. R. Cas. 236.

In *City of Chicago v. Huenerbein*, 85 Ill. 594, it was held that where land is wrongfully overflowed so as to deprive the owner of its use, the measure of damages is its fair rental value.

In *Huston v. Cincinnati, etc., R. Co.*, 21 Ohio St. 235, it was held that in an action by the vendee of the original owner against the vendee of the contracting railroad company, for failure to build fences and crossings as contracted, the rule of damages is the amount of injury to the use and enjoyment of the adjoining land, occasioned by want of such fences and crossings, during the time the railroad, or the right of way, was owned by the defendant.

Where the breach of a contractual duty or infraction of a legal right is of a continuing character, and the injury therefore is not necessarily permanent, but may cease through performance for the future of the contractual duty or legal obligation, damages for the injury already suffered may be recovered. This is a familiar rule in cases of trespass or nuisance, and in actions for breach of a covenant to repair. See *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 551; *City of Ft. Wayne v. Hamilton*, 132 Ind. 487, 493, 32 Am. St. 263.

In *Phelps v. New Haven, etc., R. Co.*, 43 Conn. 453, an

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action to recover damages for the neglect of the railroad company to keep in repair certain cattle passes which it had agreed to keep in repair, it was held that for such non-fulfilment of a continuing obligation damages up to the trial, but no prospective damages, were recoverable.

In *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41, it was held that the owner of lots abutting upon a street might maintain an action for a wrongful obstruction, but the injury not being to the freehold, nor permanent in its nature, the damages should be confined to compensation for the injury up to the commencement of the suit. It was said: "It is not to be presumed that the street will be suffered to remain for all time in such improper condition. * * * We conceive the true measure of the plaintiff's damages to be compensation for the injury sustained by him from the improper condition in which the crossing was left by the defendant; or, in other words, the difference between the fair rental value of the property with the railroad crossing in its present improper condition, and its rental value with the crossing in a proper condition,—the damages to be limited to the time of the commencement of the suit." On a subsequent appeal, *Brakken v. Minneapolis, etc., R. Co.*, 31 Minn. 45, this rule was adhered to, and it was said that its applicability was in nowise affected by the fact that the property was not rented. See, also, *Carli v. Union Depot, etc., Co.*, 32 Minn. 101.

Where A rented a mill to B and agreed to make certain alterations therein, and the alterations were defectively made, it was held that the measure of damages was the value of the use of that portion of the machinery which the lessor had contracted to furnish and which by reason of the lessor's failure could not be enjoyed by the lessee; also, that the lessee was not bound to make an expenditure which would have enabled him to have the use of the machinery as contemplated by the contract. *Green v. Mann*, 11 Ill. 613. For the ascertainment of the value of the use the court stated

that it would only be necessary to inquire as to reasonable rental value.

In *Sinker, Davis & Co. v. Kidder*, 123 Ind. 528, where a boiler sold with warranty exploded, it was held, in an action on the warranty, that the rental value of the mill for which the boiler furnished power during the time it remained idle on account of the explosion was an element of damages.

In *Montgomery, etc., Soc. v. Harwood*, 126 Ind. 440, where the plaintiffs rented a piece of ground of the defendant for a huckster stand during a fair, and it was a part of the agreement that no ground should be rented for competing stands within designated limits, it was held that the true measure of damages for a violation of this part of the agreement would be the difference in the rental value of the ground without the competing stands and the rental with such stands.

In *McCoy v. Oldham*, 1 Ind. App. 372, 50 Am. St. 208, it was held that upon failure of a landlord to make repairs, grub and clear a portion of the land, in accordance with his covenant, the tenant was not bound to do so, but might rely upon the performance of the covenant, and that the measure of recovery in such case is, ordinarily, the diminution of the rental value; but if the tenant see fit to make the repairs, he may do so and recover their cost from the landlord.

When, under a contract, a fence is to be constructed and maintained by the railroad company, there is no duty resting upon the landowner to make or repair the fences. *Toledo, etc., R. Co. v. Burgan*, 9 Ind. App. 604.

If under a statute based upon the police power the difference in the rental value of the adjoining land may be recovered, it would seem that for the violation of a contract under which the railroad company occupies and uses its right of way such damages ought not to be denied, where they in truth measure the loss accruing from the breach.

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Our statute requiring railroads to fence was enacted in 1885, after the contract here in question was made, and if the statute provides a more meager remedy than was recoverable before its enactment under a contract, and if the statute may in any case control the rights of the parties to such a contract, our statute would not have the effect of impairing the obligation of this contract.

We are not here required to decide, and we do not decide, upon any rule applicable to failure to fence as required by our statute, but we are concerned only with the question whether, if the rental value of land be actually diminished by reason of failure to perform a covenant to build and maintain a good and sufficient fence, such loss may be recovered from the delinquent party.

Upon reason and the authorities, some of which we have cited, we are of the opinion that the ascertainment of such loss may be one method of arriving at the proper damages in a particular case where such injury has been suffered. Such a covenant should be applied so as to protect and remunerate the owner fully in the sense and to the extent intended by him. Scates, C. J., in *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522.

Under its assignment of error in overruling its motion for a new trial, there has been some argument on behalf of the appellant to which counsel for the appellees have not replied in their brief.

Referring to evidence showing defects in the fence, it is thereupon insisted that the appellees could have prevented any danger from trespassing hogs by making repairs, and could have called upon the appellant for reimbursement. We have already shown that this was not the only method by which the covenantee might seek redress for the breach of the covenant.

In further discussion of the evidence, reference is made to testimony which showed that crops were raised in certain portions of the farm during parts of the period to which the

complaint relates, and it is said that the evidence showed that a "tomato crop on a portion of the land was \$65 an acre," though the place in the record where such evidence may be found is not stated. It was not necessary to a recovery that it should be proved that the appellees had been compelled to abandon their farm and to cease to cultivate it and to raise crops upon it; and the claim of the appellant in argument based upon this evidence seems to be merely that it "shows that if this were an action based on the damages which our courts have held to be the legitimate measure in such cases, there could be no recovery." The "legitimate measure" to which reference is thus made is that for which appellant had contended in the portion of its brief relating to the complaint, which we have already sufficiently discussed.

A witness shown to be qualified to testify concerning the rental value of the land testified that with a good fence between the land in question and the appellant's right of way, during the period mentioned in the complaint, the rental value per year of the farm would have been \$4 per acre, and if fifty-five acres of the farm were not protected from stock coming in from the railroad right of way, except by the railway fence between the farm and the right of way, and during the time in question that fence would not turn hogs, and part of the time would not turn sheep or cattle, the fair rental value per acre would have been \$1 less per year.

On cross-examination of this witness, he was asked by the appellant the following questions, objections to which were sustained: "Suppose that during the years 1894 and 1895, two of the years that have been mentioned, this land was rented for cash at \$5 per acre, would you say that that was the fair rental value, in your judgment?" "If, with the fence in the condition that it is now, or was at the time this suit was brought, and had been for some years previous, this land was rented for cash rent at \$5 per acre, what would you say as to that being its fair cash rental value?"

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We have not been referred to any place in the record where we might find any evidence to which the hypotheses in these questions would be pertinent, or any evidence showing that the witness knew the condition of the fence referred to in the second question. The witness had testified that \$4 per acre would be a fair rental value if the fence were good. If it was meant to ask him simply if \$5 per acre would be a fair rental value, the appellant could not have been harmed by excluding the question. The witness was asked, in effect, if the appellees sometimes succeeded in obtaining a certain larger rent per acre than that which the witness had said the land, in his opinion, was worth on the average, whether such greater rent was a fair rental value. The inference as to value to be drawn from a price received is for the jury and not for the witness.

The questions did not call for facts nor for opinions based upon facts within the knowledge of the witness or hypothetically assumed from which the opinions asked for might be legitimately drawn by the witness, and they were of a merely argumentative character.

Objection is made to an instruction given to the jury, without specifying its number or succinctly stating its substance, as directed by the rules of this court, and it is said, by way of objection thereto, that it "was in line with the theory of the plaintiff's complaint, and, as we maintain, stated erroneously the measure of damages." If what we have said upon that subject be correct, the objection to the instruction ought not to prevail.

The court refused to give one of the instructions proposed by the appellant, as follows: "If the fence in controversy was out of repair during the years named in the complaint, or some portion thereof, and if hogs and other stock breached through said fence and damaged the crops of the plaintiffs, they could not recover for such damages in this case."

The court, among the instructions given, charged the

jury that the burden was upon the appellees to prove the material averments of their complaint by a fair preponderance of all the evidence, and that unless they had done so they could not recover; also, that if the appellees had proved to the satisfaction of the jury that the appellant had failed to maintain a fence, under the agreement contained in the deed, that was sufficient to turn horses, cattle, sheep, hogs, and other domestic animals, and that the lands owned by the appellees had been injured thereby, the measure of damages for such injury would be the difference in the fair rental value of the land adjacent to said right of way with a fence maintained between the same and said lands that would turn horses, cattle, sheep, hogs, and other domestic animals, and a fence such as the evidence, in the judgment of the jury, showed the appellant had maintained along said right of way separating the same from the lands of the appellees; also, that if the jury found for the appellees, they would assess to them as damages such an amount as would in the judgment of the jury compensate the appellees for their injury under the rules of law stated to them by the court.

Having thus properly and fully stated to the jury the measure of damages to be observed in arriving at their verdict, it was not available error for the court to decline to state also to them that one other particular kind of loss, which, like various other kinds, might have been the basis of damages under other forms of complaint, was not to be taken as the measure in this case.

Another instruction requested by the appellant and rejected was as follows: "The theory of the complaint is that the plaintiffs have lost the rents of said lands by reason of the defective condition of the defendant's fence; and the court instructs you that if said lands were not, in fact, rented, or for rent, and that the plaintiffs received from said lands crops raised thereon equal to the rental value thereof, then the plaintiffs can not recover."

The theory of the complaint was properly stated by the

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court in the instructions given, and it was not properly stated in this rejected instruction. If the rental value of the land was depreciated by the breach of the covenant to maintain the fence, the appellees might recover therefor, whether or not the lands were actually rented or offered for rent. Such injury might be established without showing that no crops were received from the lands. It might be possible, notwithstanding the defectiveness of the fences, but with extra watchfulness, labor, and expense, to raise crops equal to what would be the rental value of the lands with fences in good condition, or, with or without such extra watchfulness, labor, and expense, to raise crops which, by reason of the peculiar circumstances of the sale thereof, actually equaled the rental value of the lands as it would have been with the fences in good condition. But such facts would not go to the credit of the appellant so as to prevent a recovery for its breach of covenant. However, it will be observed that the "rental value" referred to in the instruction is not confined to well-fenced lands, but is applied to the lands as they were actually fenced; and the court was called upon to tell the jury that the appellees could not recover, notwithstanding the defective condition of the fences, if from the lands defectively fenced the appellees received crops equal to the rental value of the lands with the fences thereof in their actually existing defective condition.

The judgment is affirmed.

DISSENTING OPINION.

HENLEY, J.—As is stated in the majority opinion in this case, the action begun by appellees in the lower court was for damages arising from the breach of an agreement made by appellant to fence its right of way through the lands of appellees. The allegation in the complaint in regard to appellant's agreement in the matter of fencing is that appellant "agreed in said deed to build and perpetually maintain, on the line dividing the right of way conveyed from

the residue of said Griffin farm, a good and sufficient fence against all hogs, cattle, horses, sheep, and other stock of every description." It is then alleged that appellant has wholly failed to build and maintain such fence from the 1st day of January, 1891, up to the time of the commencement of this action, by reason whereof the *rental value* of appellees' land has been greatly reduced, to wit, in the sum of \$75 per year, to appellees' damage in the sum of \$450, for which they demand judgment. I do not think the majority opinion in this case holding that for a breach of the contract to fence a right of way, as averred in this complaint, the landowner over whose farm the same is laid may recover as damages diminution of the rental value of the farm caused thereby, is in accord with the decisions of the Supreme Court of this State upon this question, nor is it sustained either by the eminent writers upon the subject of damages. It will be observed that the only damage alleged in appellees' complaint as growing out of a breach of the contract is a diminution in the rental value of the entire tract of land.

The measure of damages for the breach of such a contract as is declared upon in the complaint has been settled by the adjudications in this State, and in the language of the Supreme Court is as follows: "For the breach of a contract by a railroad company with a landowner to fence its right of way, the cost of erecting the fence, and also special damages for animals killed, for damages done by trespassing animals, and for loss of pasturage may be recovered." *Louisville, etc., R. Co. v. Power*, 119 Ind. 269; *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Logansport, etc., R. Co. v. Wray*, 52 Ind. 578; *Toledo, etc., R. Co. v. Cosand*, 6 Ind. App. 222.

The complaint in the case at bar does not seek to recover for the cost of building or maintaining the fence, nor for any special damage done by reason of the breach of the contract. This, we think, under the rule established by the decisions of our courts, makes the complaint fatally de-

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fective. There is, under the common law, no duty resting upon railroad companies to fence their tracks, and hence their liability to fence their tracks arises solely from contract or by statute. *Ft. Wayne, etc., R. Co. v. O'Keefe*, 4 Ind. App. 249.

The rule for the assessment of damages under a contract to fence does not differ from what it would have been if the duty to fence had been imposed by statute. *Louisville, etc., R. Co. v. Sumner*, *supra*; *Lake Erie, etc., R. Co. v. Power*, 15 Ind. App. 179. In the last cited case I think the question arising upon the complaint is settled adversely to appellees' contentions. It seems to me that the law as announced by the Supreme Court is most reasonable and just. The landowner was not required to fence the right of way in case the railroad company refused or neglected to erect the fence, but he can, if he so desires, erect a fence such as the contract contemplates, and recover the cost thereof from the railroad company in an action for damages based upon a breach of the contract. If he chooses to allow the right of way to remain open, then he can collect in an action for a breach of the contract *special damages* for animals killed, damages done by trespassing animals, and for loss of pasturage. The option was with the appellees whether to build the fence or to accept only such damages as they could legally recover for a breach of such a contract as they had with appellant.

It is said in 2 Sedgwick on Damages, at §631: "For the breach of an agreement to build fences and cattle-guards, the measure of damages is the cost of building them." But our courts have extended this rule so as to cover special damages, as heretofore set out, which in all cases must be alleged and proved. At the time the contract in suit was entered into, to wit, in June, 1881, we had no law in this State imposing a duty upon railroad companies to fence their rights of way. The law in force at that time simply exempted the railroad companies from certain liabilities in

case such companies erected and maintained good and sufficient fences along the line of their right of way. But it was never held by any of the courts of this State, either under the statute, or in an action for the breach of a contract to fence, that the plaintiff could recover such general damages as diminution in rental value of the whole or any part of the premises through which the railroad passed. Is it not then reasonable to infer, and must we not infer, that the parties to this contract at the time it was executed only contemplated such damages from its breach as under the existing law they could have avoided by erecting and maintaining the fence under the terms of the statute then in force? One of the familiar rules of law is that a party violating the terms of his contract contemplates only such damages as are the direct result of the breach, and only such damages are recoverable as were reasonably within the contemplation of the parties at the time the agreement was made. And so in the case of *Dorwin v. Potter*, 5 Denio 306, where A leased to B a dairy farm, agreeing as a part of the consideration for the lease to put certain barns on the premises in good repair, but failed to comply with his agreement, and in an action against A for a breach of the contract it was held that B could recover the amount it would cost to repair the barns but that he could not recover damages for the decrease of the produce of his dairy resulting from the condition of the barns, such damages being, in the language of the opinion, "altogether too remote and contingent."

In this case the agreement, by the averments of the complaint, being to erect and maintain a *stock proof fence*, the decrease in the rental value would be contingent upon the owner suffering some of the damages for which in the same action for a breach of the contract he would be, under our decisions, entitled to recover. This would make such damages as decrease in rental value, in an action for the breach of the contract in suit, not only speculative, but remote. The decisions of the higher courts of Minnesota and Iowa cited

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by counsel for appellees, and which seem to aid the theory of the complaint, will be found, upon examination, to be founded upon statute. Thus the principal cases relied upon by appellees' counsel, the cases of *Emmons v. Minneapolis, etc., R. Co.*, 38 Minn. 215, and *Emmons v. Minneapolis, etc., R. Co.*, 35 Minn. 503, were not founded upon a breach of a contract to fence against stock, but were, under the statute of the state of Minnesota, which is as follows: Gen. Stat. of Minn., 1878, c. 34, §57: "Any company or corporation operating a line of railroad in this state and which company or corporation has neglected to fence said road * * * shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect." The language of this statute being broad and general was held to cover any decrease in the value of the real estate caused by a failure to comply with its terms, and under the same statute it was held that the railroad company must respond in damages caused by death of a child *non sui juris* who had wandered upon the company's right of way where the same was not fenced and was killed by a locomotive passing over the road.

Under our statute the contrary has been expressly held by this court. *Baltimore, etc., R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. 252.

Admitting for the purpose of considering appellant's motion for a new trial that the complaint stated a cause of action against appellant, I will consider the action of the lower court in overruling the motion for a new trial. Rent is defined as being a definite compensation or return reserved by a lease, to be made periodically or fixed with reference to a period of time, payable in money, produce, other chattels, or labor, for the possession and use of land and buildings. Century Dictionary. Diminution of rental value is the diminution of the compensation or return to which the lessor is entitled from his tenant or lessee. This action was brought to recover damages for the diminution in the

rental value of the whole tract of land, through which appellant's road passed, for six years immediately preceding the commencement of the action. The evidence wholly fails to sustain the judgment of the lower court. The evidence of the appellees is they occupied the land themselves except one year during the six years before the filing of the complaint. That during one year the land was rented for cash rent. That the lessee paid \$5 per acre cash rent for the land, and under the evidence of both appellees this was the full rental value of the land with a fence along appellant's right of way such as the contract called for. Appellee Cory, sometime during said six years married the daughter of his co-appellee, and moved upon said land after the tenancy of one year had expired. Appellees testified that they made no attempt to rent the farm to any one; that it was not offered for rent; that the only year the farm was rented the tenant contracted with them at the price asked of him. There was no evidence that appellees used this real estate for rental purposes, or that they had lost anything whatever in diminution of rental value, and there is no charge nor attempt to prove an injury to the freehold. For the reasons stated I think the judgment of the lower court ought to be reversed.

Wiley, J., concurs in the dissenting opinion.

ON PETITION FOR REHEARING.

BLACK, J.—In passing upon the appellant's petition for a rehearing, it is thought to be not improper to remark that upon the original hearing there was no discussion by counsel of the question as to the sufficiency of the evidence beyond the matters mentioned and disposed of in the principal opinion.

The petition for a rehearing, after careful reëxamination of the case, is overruled.

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BOYD, ADMINISTRATOR, v. THE BRAZIL BLOCK COAL COMPANY.

[No. 2,279. Filed April 28, 1898. Rehearing denied June 22, 1900.]

ACTION.—Statutory Right.—When a new right or proceeding is created by statute, and a mode prescribed for enforcing it, that mode must be pursued to the exclusion of all others. *p. 162.*

MINES AND MINING.—Death by Wrongful Act.—Statute Construed.—Parties.—Under the act of 1891 (Acts 1891, p. 57) relating to coal mining, vesting the right of action for recovery for death of employe in certain persons therein named, the administrator of a deceased employe of a coal mining company, operated under the provisions of said act, cannot maintain an action for the death of such employe caused by the caving in of the mine. *pp. 160, 163.*

From the Clay Circuit Court. *Affirmed.*

S. D. Coffey, Albert Payne and J. T. Dye, for appellant.
Geo. A. Knight, for appellee.

COMSTOCK, J.—This cause was transferred to the Supreme Court for the reason that counsel claimed a constitutional question was involved. The Supreme Court ordered its return to this court upon the ground that no constitutional question was properly presented.

This action is prosecuted by the appellant, John Boyd, as administrator of the estate of John W. Elliott, deceased, under §285 Burns 1894, to recover damages for the benefit of Elliott's children on account of a personal injury sustained in a coal mine, which resulted in his death. The complaint consists of three paragraphs.

The court sustained a demurrer to each paragraph of the complaint, and rendered judgment against plaintiff for costs. This ruling of the court is assigned as error.

The first paragraph of complaint is based upon §§7466, 7473 Burns 1894.

Section 7466, *supra*, provides "that the owner, operator, agent, or lessee of any coal mine in this State shall keep a

sufficient supply of timber at the mine, and the owner, operator, agent or lessee shall deliver all props, caps and timbers (of proper length) to the rooms of the workmen when needed and required, so that the workmen may at all times be able properly to secure the workings from caving in."

Section 7473, *supra*, provides "that for any injury to person or persons or property occasioned by any violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby," etc.

This paragraph of the complaint alleges, in substance, that at the time of the injury complained of, and for a long time prior thereto, the appellee was a corporation organized under the laws of the State for mining purposes, and was engaged in mining coal in Clay county, employing in the mine where the deceased received his fatal injury more than 100 men; that the deceased was in its employ as a coal miner, as its servant, by reason of which it was the duty of the appellee to use reasonable diligence to furnish him a safe place in which to work, and to that end it became and was the duty of the appellee to keep a sufficient supply of timber at said mine and to deliver at the room in said mine, where said Elliott was engaged in mining coal, all props, caps, and timber of proper length needed and required by him in properly securing his working place in said room from caving in and crushing him; that the appellee wholly neglected and failed to perform and discharge its duty in that behalf, but, on the contrary, wilfully, carelessly, and negligently omitted and refused to deliver at the room and working place, where the said Elliott was at the date aforesaid engaged in mining coal, all props, caps, and timbers, of proper length, needed by him so as to enable him properly to secure his working place from caving in, or to deliver to him any timber whatever, although often

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requested so to do; that on the 12th day of January, 1895, by reason of the fact that the roof of the room and working place where said Elliott was engaged in mining coal was not properly secured by timbers, by reason of the negligence of the appellee to furnish timbers for that purpose, the same caved in, fell upon and crushed the said Elliott, without any fault or negligence on his part, so that he soon thereafter died; that if the appellee had not negligently and carelessly omitted and refused to furnish and deliver to the said Elliott, at his room and working place, the timber necessary for that purpose, and had performed its duty in that behalf, the said Elliott could and would have secured the roof of said room and working place, and said injury would not have occurred; that at the time of said injury the said Elliott was in the exercise of due care and caution, and but a few minutes prior to his death had carefully examined said roof, and was wholly unable to find or detect any defect therein, and had no knowledge whatever of the defect which caused the same to cave in and crush him, and was wholly ignorant of the danger in which he was placed, said defect being latent and not discoverable by the usual and ordinary tests, but that said roof would and could have been secured against the possibility of caving in and crushing the deceased but for the negligence of the appellee as stated herein; that without said props, caps, and timbers so required to be furnished by the appellee, the working place of the said Elliott was unsafe and dangerous, which fact was known to the appellee, or by the use of ordinary care and diligence might have been known to it, and was unknown to the said Elliott; that at the time of his death the said Elliott left surviving him as his only heirs at law certain minor children, whose names are set out in the complaint.

The second paragraph of the complaint is based upon §§7472, 7473 Burns 1894. We have already set out so much of §7473 as is necessary to the question here presented.

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Section 7472 is as follows: "That the mining boss shall visit and examine every working place in the mine at least every alternate day while the miners of such place are, or should be at work, and shall examine and see that each and every working place is properly secured by props or timber, and that safety in all cases is assured, and, when found unsafe, he shall order and direct that no person shall be permitted in an unsafe place, unless it be for the purpose of making it safe. He shall see that a sufficient supply of props, caps, and timber are always on hand at the miners' working places."

In addition to the allegations contained in the first paragraph of the complaint, it is alleged in the second paragraph that it became and was the duty of the appellee to visit and examine, by its mining boss, every working place in its mine at least every alternate day while miners employed therein were or should be at work, and to examine and see that each and every working place therein was properly secured by props, or timbers, and that the safety was in all respects assured; and when any of said places were found to be unsafe, it was its duty to order and direct that no person should be permitted in such places unless for the purpose of making it safe; that it was its further duty to see that a sufficient supply of props, caps, and timber was always on hand at the miners' working places. These allegations are followed by the usual allegations of neglect to perform the duty, substantially as found in the first paragraph.

The third paragraph is drawn upon the theory that appellee purposely, wilfully, and intentionally violated the provisions of the mining statutes, and for that reason it is liable to appellant on account of the injury to his decedent occasioned thereby, without reference to any question of negligence on his part.

The first question to be determined in this appeal is whether, under the statutes, the personal representative of the deceased has any right of action. Counsel for appellee

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insist that he has not, and for that reason, if for no other, the demurrer was by the lower court properly sustained to each paragraph of the complaint. The question is properly raised by the demurrer for want of facts. *Pence v. Aughe*, 101 Ind. 317; *Farris v. Jones*, 112 Ind. 498; *Wilson v. Galey*, 103 Ind. 257.

Section 7473 Burns 1894, §5480n Horner 1897, being section thirteen of the act of 1891, under which appellant has brought this action, provides: "That for any injury to person or persons or property occasioned by any violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation; a right of action shall accrue to widow, children, or adopted children, or to the parents or parent, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for like recovery for damages for the injury sustained by reason of such loss of life or lives."

The language of this section clearly gives the right of action to certain parties named. In *Board, etc., v. Davis*, 136 Ind. 503, on p. 520, the Supreme Court say as to the interpretation of statutes: "First of all * * * if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition."

Under our statute, unless otherwise provided, all suits must be brought in the name of the real party in interest. The estate of the deceased can have no interest in the provision made by the statute. It is not a claim due the estate. The right of action is given the widow, and it is not vested in any other than the beneficiaries therein named.

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When a new right or proceeding is created by statute, and a mode prescribed for enforcing it, that mode must be pursued to the exclusion of all others. *Storms v. Stevens*, 104 Ind. 46.

In *Martin v. West*, 7 Ind. 657, "the plaintiff claims a right of action under section ten of an act approved March 4, 1853, entitled 'An act to regulate the retailing of spirituous liquors' " etc. The act provided that no person should be permitted to retail spirituous liquors until giving bond conditioned for the keeping of an orderly house and for the payment of fines, penalties, and damages that might be incurred under the provisions of the act. Section ten gave a right of action to any wife, child, parent, guardian, employer, or other person, who should be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication of any person in his own or her own name "against any person and his sureties on the bond aforesaid, who shall, by retailing spirituous liquors, have caused the intoxication of such person, for all damages sustained." The court held that the statute pointed out the rule of proceeding, namely, by suit on the bond, and that the complaint was therefore defective.

Section fourteen of the act of the general assembly of Illinois, upon the subject of miners, entitled "An act to provide for the health and safety of persons employed in coal mines" approved March 27, 1872, R. S. 1874, p. 708, is in substantially the language of section thirteen of the act under consideration.

The right of action in case of the death of the husband, occasioned by the wilful violation of the act, is in the widow, etc. The general act of Illinois for wrongful injuries resulting in death is in the personal representative.

In the case of *Litchfield Coal Co. v. Taylor*, 81 Ill. 592, which was an action brought under said act, appellee, in the commencement of the action, sued as administratrix of the estate of decedent, who was her husband. Subsequently, on

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motion, the court allowed the summons and declaration to be amended so that the action might proceed in the name of appellee as widow of the decedent. This amendment was assigned as error. In passing upon the question, the supreme court said: "We are satisfied that the widow was the proper person to bring the action. The fourteenth section of the act expressly authorizes her to bring the suit. Chapter seventy entitled 'Injuries,' R. L. 1874, p. 582, which authorizes an action in the name of the personal representatives did not repeal the fourteenth section of the act entitled 'Miners.' The former act is general, while the act in relation to miners may be regarded as special, and the latter must control as to all cases specially enumerated in the act itself, while the other act, being general, would embrace all other cases." See also, *McCormack v. Terre Haute, etc., R. Co.*, 9 Ind. 283; 1 Waite's Actions & Def., p. 42; *Ryan v. Ray*, 105 Ind. 101; *Bartlett v. Manor*, 146 Ind. 621; *Fisher v. Tuller*, 122 Ind. 31; *Gibbs v. City of Hannibal*, 82 Mo. 143; *McNamara v. Slavens*, 76 Mo. 329; *Spiva v. Osage Coal, etc., Co.*, 88 Mo. 72; *Shepard v. St. Louis, etc., R. Co.*, 3 Mo. App. 553.

We think the right of action is limited to the beneficiaries named in the act, and for this reason the judgment of the lower court must be affirmed.

The conclusion reached renders it unnecessary to pass upon the other alleged errors.

DISSENTING OPINION.

HENLEY, J.—I desire at this time to dissent from the conclusion reached by the majority of the court, and express the opinion that the act under which this action was brought is unconstitutional for other reasons than those advanced by counsel for appellee in the case of *Maule Coal Co. v. Partenheimer*, 155 Ind. 100.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. ADAMS, BY HIS NEXT FRIEND.

[No. 2,865. Filed Feb. 1, 1900. Rehearing denied June 22, 1900.]

RAILROADS.—*Injury at Crossing.—Complaint.*—A complaint against a railroad company for personal injuries alleging that plaintiff approached defendant's tracks and stopped his horse and dray and listened to ascertain whether a train standing near was about to move, when an employe of defendant, in charge of the train, standing on the main track at the rear of the train, knowing plaintiff was about to cross the tracks and had stopped to listen, motioned with his hand for him to drive across the tracks, and that plaintiff, in attempting to cross the tracks as directed, was struck by the train, and injured, is insufficient, where it was not shown that such employe was acting in the line of his duty, or that he had any power or authority to bind the defendant by his act.

From the Madison Superior Court. *Reversed.*

John L. Rupe, for appellant.

W. A. Brown, for appellee.

BLACK, J.—A demurrer to the complaint of the appellee against the appellant for want of sufficient facts was overruled in the Henry Circuit Court, where this cause was commenced. An answer in denial was filed, and the venue was then changed to the court below, where the cause was tried by jury, and a general verdict was returned in favor of the appellee for \$3,000, and judgment was rendered accordingly.

In the complaint there were allegations describing at length the location of the appellant's railway tracks and the surroundings, in the town of New Castle. It was shown that a street in said town known as Broad street, extending east and west, was crossed by the main track of the appellant's railway running in a northwesterly direction; that at a short distance east of the crossing and north of said main track was the freight depot with an elevated platform, along the north side of a side-track which extended from a

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point some distance to the eastward and was parallel with the main track and between it and said depot; that another side-track of the appellant lay some distance north of said first mentioned side-track and nearly parallel with it, and extended from the eastward to a point near the east end of said depot. Said side-tracks were used by the appellant and the public generally in receiving and delivering freight. From said Broad street and the west side of the main track at said crossing there was constructed and for many years there had been maintained a roadway, extending from the street southeastward along the south side of said main track several hundred feet to a point east of said depot and south of the main track, where the appellant had constructed and for many years had maintained, and still maintained, a safely constructed crossing for wagons and teams across the main track and the first mentioned side-track, affording a way of ingress to and egress from the cars standing upon said tracks, for the purpose of delivering and receiving freight, and along this roadway and crossing was the customary way of going to and from said side-tracks to deliver and receive freight, and the appellant constructed and maintained the roadway and crossing for such purpose alone and for the accommodation of the public in transacting freight business with the appellant. It was alleged that on, etc., the appellee was a young man about eighteen years of age, and was in the employ of his brother, named, a dealer in poultry, eggs, and produce in said town; that in the course of his duties as such employe the appellee was required to deliver and receive freight to and from the appellant at said side-tracks by means of drays; that a short time prior to the date mentioned, a large number of egg crates, used in packing and shipping eggs, had been shipped to appellee's brother, which the appellant had transported in a box car, and appellant had placed said car upon said side-track farthest north, and had notified appellee's said brother of the arrival thereof and that they were delivered

to him for his use; that appellee, in the course of his duty as such employe, took a dray to which was hitched one horse and drove to said car for the purpose of draying a portion of the crates to his said brother's place of business; that the dray was an ordinary platform dray, safely and properly constructed, and the horse was a docile, gentle horse used and inured to cars and moving trains, and had been used by appellee's said brother continuously in and about the cars in receiving and delivering freight for more than a year prior to said time; that when the appellee reached the crossing of said street and railroad, proceeding from the west in the regular course of travel from his said brother's place of business to the situation of said freight car, a freight train of the appellant was standing on the main track headed to the northwest; that he turned and drove his horse and dray from said street to the southeast on said traveled way along the south side of said main track and along the south side of said freight train to the point where said crossing southeast of the freight depot was constructed, and he there drove across to the north side of said first mentioned side-track and then turned eastward and drove from 200 to 250 feet further to said car containing the crates, which he loaded in a usual, proper, and careful manner, described; that he was engaged in loading the crates from ten to fifteen minutes; that when he so crossed the railway going to said car, said train had been cut, leaving a caboose standing from 300 to 500 feet east of said crossing and the rear end of the other part of the train standing within about ten feet of said crossing; that the freight train was a long train, and the engine attached to it was from 600 to 800 feet northwest of the place where the appellee had so crossed the tracks. The pleading described obstructions which hid from his view the caboose and all of the freight train except about fifteen or twenty feet of the rear end of the hindmost car of the train. It was alleged that as soon as he had loaded his dray he drove along the south side of the northern side-

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track until he came to a point where one so driving would naturally turn the horse to the left, heading in a south-westerly direction across said tracks, until he reached a point about fifty feet from the railway track, where he stopped his horse and dray and listened for the purpose of ascertaining whether or not the train was about to move; that at this time one of the employes of the appellant in charge of said train was standing in the main track upon said crossing within a few feet of the rear end of said freight car and train. It was alleged that said employe knew, and had good reason to know, that said train was then about to back across said crossing for the purpose of coupling on to said caboose; that knowing and having good reason to know that fact, said employe, knowing the appellee was approaching said track and had stopped as aforesaid, negligently and carelessly wholly failed to warn him or to give him any notice or indication whatever that said train was about to move over said crossing as aforesaid, and, on the contrary, negligently and carelessly motioned the appellee with his hand to drive across said crossing; that upon his giving said motion, the appellee, believing that said train was not about to start or move, and relying upon said signal, started in a slow walk to drive across said track, and, just as his horse's head was approaching the crossing of the main track, the appellant's employe in charge of said train negligently and carelessly, without theretofore or at any time sounding any whistle or ringing the bell, suddenly started said train back to and over said crossing; that the starting of the train and the bumping of the cars created a very considerable noise and confusion; and the moment that the appellee saw the train was moving, or became aware thereof in any way, he suddenly pulled his horse back by means of the lines, and the horse, becoming frightened at the movement of the train and the noise thereof, turned to the right and to the northwest, in the direction of the switch track, and momentarily the hind end of the train struck the dray

with great force, overturning and throwing it against the platform of the freight house upon the north side of said switch track, and throwing the appellee forward upon the ground upon and near the north rail of the main track; that in said collision the appellant's cars in said train mashed and maimed his right arm from the hand to the elbow, in such manner that it became and was necessary to amputate his right arm above the elbow; that said injury was caused wholly and entirely by the carelessness and negligence of the appellant's employes in charge of said train as aforesaid, and without any fault, negligence, or want of care upon the part of the appellee in any particular whatever. The additional averments related to the damages sustained by the appellee.

It is suggested, on behalf of the appellant, against the complaint that no facts are pleaded from which the court may know that the employe who stood behind the train was acting within the line of his duty, or that he had any power or authority to bind the appellant by his act.

It is not shown in what respect there was negligence in backing the train. The appellant had a right to back the train upon its track for the purpose of coupling it with the caboose. The mere act of backing the train in the prosecution of its business, with the incidental noise, was not wrongful, and was not in itself a violation of any duty which the appellant owed to the appellee.

It is alleged that the appellant's employe in charge of the train negligently and carelessly, without sounding the whistle or ringing the bell, suddenly started the train, but it is not stated that the failure to sound the whistle or to ring the bell was negligent, or that there was any negligent failure of the appellant to give warning of the movement of the train. It is not stated that the train was negligently run against or upon the appellee or his dray. It does not appear that the employe who started the train had any notice or knowledge of the appellee's near approach and hazardous

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situation, or that his alleged negligence in starting the train consisted in his failure to act prudently in view of knowledge or notice of any facts which ought to have deterred him from moving the train in the regular pursuit of his duties. A situation was shown indicating the propriety of backing the train to take up the caboose, at any time when the employe who caused the train to back was ready to do so, unless he had knowledge or notice of some fact which would make it proper to wait longer. No negligence is attributed to any one in failing to give notice of the dangerous situation of the appellee to the employe who started the train, who does not appear to have known at any time of the appellee's situation. It is not alleged that the appellant backed the train or that it by its servant did so; and as to the appellee, it could not be negligence of the employe who started the train in the manner described for him to do so without some notice which would raise a duty toward the appellee. The manner of starting the train backward with suddenness, causing the violent bumping of the cars together, might have been unskilful and negligent, but so far as the employe who did it was concerned this would not be a violation of duty toward the appellee, of whose presence he had no knowledge or notice.

If, then, the allegations relating to the servant who stood upon the main track in rear of the train be left out of consideration, there would not be enough to charge the appellant with actionable negligence.

This person was alleged to be one of the appellant's servants in charge of the train, and he, it was averred, with knowledge of the appellee's approach and of the fact that the train was about to back, failed to warn him to stop, and beckoned him on. The wrong, if any, which proximately caused the injury, was the act of this servant in beckoning to appellee with knowledge that the train was about to back.

It does not appear that he, in this conduct, was pursuing his service for the appellant within the scope of his employ-

ment, unless it can be said that the court may presume, as matter of law, that such conduct is within the scope of the employment of any and every servant of a railroad company who is one of its employes in charge of any freight train. It is generally known to the public that the different members of the crew of a freight train do not all have the same kind of employment, do not all perform in the regular course of their employment all kinds of service incident to the running of such trains and the transportation of freight thereby.

The appellee was not a trespasser, or a mere licensee, or a servant of the appellant. His relation to the appellant was that of an invited business visitor, with respect to whom a duty devolved upon the appellant to have its premises in a reasonably safe condition, and, by proper safeguards or warning, to enable him, by the exercise of ordinary care, to avoid, while upon the premises engaged in the business for which he was invited, or while entering or leaving the premises, damage from an unseen or unusual danger from want of such safe condition, of which the appellant had knowledge or by the exercise of reasonable vigilance would have had knowledge. *Indermaur v. Dames*, L. R. 1 O. P. 274; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Tobin v. Portland, etc., R. Co.*, 59 Me. 183; *Carleton v. Franconia, etc., Co.*, 99 Mass. 216; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. 193; *Indiana, etc., R. Co. v. Barnhart*, 115 Ind. 399; *Chicago, etc., R. Co. v. DeBaum*, 2 Ind. App. 281; *Howe v. Ohmart*, 7 Ind. App. 32; *Toledo, etc., R. Co. v. Hauck*, 8 Ind. App. 367; Elliott on Railroads, §1248.

In the case before us there was no defective condition of the premises or of any of the appliances used thereon. The backing of the train which occasioned the injury was not a wrong inherently and of itself, or in the absence of wrong

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attributable to the appellant on the part of the servant in rear of the train. The backing of the train was an act done in the ordinary prosecution of the business of the appellant and one proper to be done for such purpose. The appellee had a right to use for egress the way over the main track by which he had entered. The appellant also had a right to back its train upon that track over the crossing in the manner in which it was done. It was not a case where negligence of the appellant could be presumed from mere backing of the train and the occurrence of the injury therefrom; but it was a case wherein, to render the appellant responsible for that injury, it was incumbent upon the appellee to show negligence upon the part of the appellant.

It is not alleged that the appellant itself or the appellant by its officers, agents, or servants, or any of them, negligently did any act or negligently omitted anything; all the negligent acts and omissions charged are alleged as acts and omissions of the appellant's servants. To hold that the complaint shows any negligent act or omission for which the appellant may be considered responsible, it must be determined that the pleading shows that such alleged wrongs of the servants were committed by them in the course of their employment.

It is a familiar rule that for the acts of a servant his master is responsible to third persons only when the servant is acting within the scope of his employment. *Noblesville, etc., Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224; *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394, 400.

A negligent act of a servant for which the master will be responsible must not only be an act done while the servant is engaged in the performance of his service but also must be an act which pertains to the duties of the servant's employment.

The test of the liability of the master for the torts of his servant is not whether or not the act was done in accordance with his instructions, but is whether or not the servant at

the time of committing the tort was acting within the scope of his authority in the business of the master. If the act was done within the scope of authority, and while the servant was engaged in his master's business, the latter is bound for it. *Snyder v. Hannibal, etc., R. Co.*, 60 Mo. 413; *Chicago, etc., R. Co. v. Casey*, 9 Ill. App. 632; *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819.

In *Barwick v. English Joint Stock Bank*, 2 Ex. 259, it was said, per Willes, J.: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." And it was said that when the master has not authorized the particular act, but he has put the agent in his place to do that class of acts, he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in. See Webb's Pollock on Torts, 88.

A complaint for injury caused by negligence of the defendant's servant, which did not show the act of negligence to have been committed while the person who committed it was engaged in the service and to have been in some way connected with the doing of the service, was held insufficient in *Helfrich v. Williams*, 84 Ind. 553.

In *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 394, 49 Am. Rep. 770, it was said that the authority of an agent, officer, or employe of a corporation will be presumed from the nature of the duties imposed upon him; but "in order that this presumption may be indulged, it must in some way be known what those duties are." See, also, *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394, 400.

In *Pennsylvania Co. v. Rusie*, 95 Ind. 236, an action against a railway company for the killing of stock, the complaint, which was first questioned by motion in arrest, was assailed in argument on the ground that it did not charge a

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wrong upon the railroad company, but charged it upon the company's servants, without any averment that they were in the line of their employment in operating the train. It was held, that the objection so presented could not prevail, for the reason that the action was commenced before a justice of the peace.

The allegations in such a case, indicating the nature of the servant's employment and showing that the negligence of the servant of which complaint is made occurred while the servant was engaged in his employment as such, or was acting within the line or scope of his employment, are allegations of material facts which must be proved. See *Oakland City, etc., Soc., v. Bingham*, 4 Ind. App. 545; *Curtis v. Dinneen*; 4 Dak. 245, 30 N. W. 148; *McCann v. Tillinghast*, 140 Mass. 327, 5 N. E. 164; *Evansville, etc., R. Co. v. Baum*, 26 Ind. 70; *Banister v. Pennsylvania Co.*, 98 Ind. 220; *Lake Shore, etc., R. Co. v. Peterson*, 144 Ind. 214, 222.

In an action against a railroad company for a personal injury, it was objected that the complaint was defective in failing to aver that the agents and servants of the defendant were acting within the line of their duty when they committed the wrong complained of; but the court said that the complaint "in effect averred that it was the defendant, acting through its agents and servants, which had injured the plaintiff;" and it was held that it was equivalent to an averment that the injury was inflicted by the defendant, acting through its duly authorized agents and servants; and that this made it at the trial a question of evidence as to whether the persons who performed the acts charged were the agents and servants of the defendant and acting at the time within the lines of their respective duties. *Wabash R. Co. v. Savage*, 110 Ind. 156; *Ohio, etc., R. Co. v. Col-larn*, 73 Ind. 261, 38 Am. Rep. 134.

It may be difficult to determine whether upon the facts of a particular case a servant was acting within the scope

of his employment, or was acting upon his own responsibility and not in his capacity of servant; but we are not here passing upon the effect of evidence; we decide nothing upon the question whether or not the servant who misled the appellee was in fact acting at the time within the scope of his employment. The question before us is one relating to pleading, and it cannot be doubted that, however the matter may take shape through the evidence, the pleading must so connect the master with the act or omission of the servant, that it may be seen from the averments that the master is liable because the servant represented him in the doing of the wrong.

Whatever may be true with reference to drawing inferences from evidence, and however improper it may be for the court to interfere with the decision of questions of fact within the province of the jury, the pleadings are within the supervision of the court alone, and the question as to the sufficiency of a pleading must be decided as a question of law. In deciding upon a demurrer the meaning of a pleading must be gathered from what is expressed therein. It can not be held that one is responsible for a wrong simply because it was committed by one who at the time was his servant, or without a sufficient showing that the servant was acting within the scope of his employment.

At first view, the question may be regarded perhaps as not free from difficulty. Two servants of the appellant are mentioned in the pleading in such manner as to indicate them as members of the train's crew. Can it reasonably be said that it would be within the line of service for which the engineer or the fireman was employed by the appellant for him to go to the rear of the long freight train, and there, without special direction or authority from the appellant, or any special or extraordinary reason, to interfere with, control, or direct the conduct of business visitors upon the appellant's premises, such action of the servant not having relation to the protection of the train or the opera-

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tion thereof by him? If in the pleading it were stated that the appellant negligently did the act in question, or that the appellant by its servant negligently did it, we need not and do not decide how such allegation might be proved.

Without anticipating what would be a proper conclusion under the evidence showing a particular capacity in which the servant in question was employed by the appellant, we think it not allowable to relax the proper strictness of the law of pleading so far as to hold that the complaint before us sufficiently showed that the servant in rear of the freight train, as to the action wherein he is alleged to have been negligent, which was the proximate cause of the injury, was acting within the scope of his employment.

The judgment is reversed, and the cause is remanded, with instruction to sustain the demurrer to the complaint.

MASTEN v. THE INDIANA CAR AND FOUNDRY COMPANY.

[No. 8,052. Filed April 18, 1900. Rehearing denied June 22, 1900.]

APPEAL AND ERROR.—Waiver.—Default.—Where a proceeding to set aside a default was disposed of on its merits without objection to the form of the proceeding, no such question can be raised on appeal. *p. 177.*

SAME.—Default.—Pleading.—Where an application to set aside a default is not treated as a pleading in the trial court it cannot be thus questioned on appeal. *p. 178.*

PLEADING.—Judgment.—Default.—In a proceeding, under §399 Burns 1894, to set aside a default the original cause of action need not be set out, but merely the nature of the action and defense. *p. 179.*

EVIDENCE.—Affidavits.—Judgment.—Default.—Where in a proceeding to set aside a judgment rendered by default defendant filed affidavits tending to show excusable neglect, mistake and inadvertence, and plaintiff filed counter-affidavits in conflict with the showing made by them, the rule applicable to oral evidence applies, and the conclusion of the court thereon will not be disturbed if it is supported by any evidence. *pp. 179-181.*

OFFICERS.—Attorney-General.—There is no constitutional or statutory inhibition against the Attorney-General practicing law. *p. 181.*

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APPEAL AND ERROR.—*Judgment.—Default.*—The action of the court in setting aside a judgment rendered by default upon application and affidavits tending to show that the default resulted from excusable neglect and inadvertence will not be disturbed on appeal unless an abuse of discretion on the part of the trial court is shown. pp. 182-187.

From the Marion Superior Court. *Affirmed.*

John B. Sherwood, for appellant.

W. A. Ketcham and *F. E. Matson*, for appellee.

ROBINSON, J.—On May 29, 1896, at the May term of the Marion Superior Court, appellant obtained a judgment by default against appellee. At the next term, June 8, 1896, appellee moved to set aside the default and vacate the judgment, and with its motion filed the affidavit of its attorney, Mr. Ketcham, as to excusable neglect, mistake and inadvertence, and the affidavit of its general manager, Mr. Frazier, as to a meritorious defense to the original suit. Appellant appeared and filed the counter-affidavit of his attorney, Mr. Sherwood, in denial of appellee's right to the relief asked. Upon the hearing the default was set aside and appellee permitted to answer; and an answer in general denial was then filed. Time was given to file a bill of exceptions, which was done. An appeal to this court, from the order setting aside the default and vacating the judgment, was dismissed March 30, 1898. *Masten v. Indiana Car, etc., Co.*, 19 Ind. App. 633.

The record then recites that May 24, 1898, "Come the parties, and this cause being called for trial and the plaintiff declining and refusing to introduce any evidence, the court finds for the defendants. It is therefore considered, adjudged, and decreed by the court that the plaintiff take nothing by this action and that the defendant recover of the plaintiff its costs, taxed at ——— dollars."

Appellant assigns as error that appellee's motion and the affidavits in its support do not state facts sufficient to constitute a cause of action, that the court erred in sustaining the defendant's motion to set aside the default and judg-

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ment, and that the court erred in rendering final judgment for the appellee.

The motion and the affidavits and the counter-affidavit are entitled as of the original case. As no objection was made to this in the court below and as the matter was disposed of upon its merits without objection to the form of the proceedings, no such question can be raised now, even conceding, without deciding, that it might have been successfully raised below. *Beatty v. O'Connor*, 106 Ind. 81.

To the statute, §644 Burns 1894, §632 Horner 1897, permitting appeals from final judgments only, there are certain exceptions. §658 Burns 1894, §646 Horner 1897. It was held that the former appeal, *Masten v. Indiana Car, etc., Co.*, 19 Ind. App. 633, did not come within the exceptions, and that the judgment from which an appeal may be taken must make a final disposition of the cause.

If the motion and affidavits are to be disposed of "in a summary manner upon the affidavit and the facts within the knowledge of the judge", *Ratliff v. Baldwin*, 29 Ind. 16, we do not think the statute contemplates anything in the way of pleadings. A counter-affidavit is not an answer in the sense of pleading. The motion and affidavits do not attempt to state any cause of action. The whole purpose of the proceeding is not that the judgment may be adjudged null and void, but that the default may be set aside and the party be permitted to interpose a defense to the action. The moving party is not asking for a judgment, and a judgment of any kind in his favor does not necessarily follow if he is successful. A demurrer to the motion and affidavits for want of facts would have amounted simply to a submission of the motion and affidavits to the court for a hearing on the facts therein set out.

In the case at bar, the proceeding was a motion supported by two affidavits. Appellant appeared in response to notice, filed a counter-affidavit, and upon these the matter was submitted and determined.

As said by the court in *Brumbaugh v. Stockman*, 83 Ind. 583: "Whether the proceeding be by complaint or motion, it must be determined in a summary manner; no pleadings are contemplated beyond the complaint or motion. *Buck v. Havens*, 40 Ind. 221; *Lake v. Jones*, 49 Ind. 497; *Nord v. Marty*, 56 Ind. 531. Upon a complaint, the evidence may consist of affidavits, depositions or oral testimony, but a motion is still properly heard on affidavits only, although in the discretion of the court oral testimony may be heard also; counter-affidavits being admissible on the point on which relief is sought, but not as to the cause of action."

Had a demurrer been filed, the sufficiency of the motion and affidavits might have been tested. *Thompson v. Harlow*, 150 Ind. 450; *Durre v. Brown*, 7 Ind. App. 127.

The motion and affidavits must be considered as a whole. It does not appear that they were submitted to the court as a pleading. Appellant appeared and filed a counter-affidavit, submitted the issues presented by the several affidavits, not as a matter of pleading, but of evidence. Whether the statute does or does not contemplate any pleading "beyond the complaint or motion", as indicated by the above authorities, we think it not an unsafe rule to hold that if such an application is not treated as a pleading in the trial court, it can not be thus questioned on appeal. As the questions argued may all be properly considered under the second assignment, it is not necessary further to notice the first.

It is argued that the affidavit of Mr. Ketcham shows that when appellee was served with summons, it gave no attention to defending the action. In answer to this it is enough to say that the affidavit clearly shows that when the default was taken Mr. Ketcham represented appellee as its attorney in the matter in controversy and that the relation of attorney and client existed. From the facts set out in the affidavit it is clear that appellee had a right to rely upon his attention to the cause. That the negligence of an attorney

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is the negligence of his client is well settled. It is shown that he was employed three months before suit was brought to defend the action if brought, and was told by appellee to appear and defend in the event any action was brought, and that he investigated the matter before suit was brought and reported the result of his investigation to appellee. It is evident from all the facts that the default judgment was not proximately caused by appellee's negligence.

The statute does not require that the motion and affidavits should set out the original cause of action but simply the nature of it. The facts constituting the defense must be shown, but it is necessary to state only the nature or character of the original action. In passing upon such an application the court will not inquire into the merits of the original action and, for this reason, counter-affidavits as to the alleged facts relied on as a defense are not admissible. *Dobbins v. McNamara*, 113 Ind. 54, 3 Am. St. 626; *Buck v. Havens*, 40 Ind. 221; *Nord v. Marty*, 56 Ind. 531.

From the motion and affidavits it is clear the original action was by appellant against appellee for personal injuries. *Durre v. Brown*, 7 Ind. App. 127; *Wills v. Browning*, 96 Ind. 149.

Some confusion arises from the fact that the affidavits and counter-affidavits refer to the complaint, and it, with the answer, is set out in the transcript. They necessarily came before the trial court at some stage of this proceeding for the reason that the final judgment rendered could not have been rendered without them. But, in any event, there is enough in the affidavits themselves to show the nature of the original action and that appellee had a meritorious defense. The principal question in the case is whether there is a showing of mistake, inadvertence or excusable neglect.

The affidavit of Mr. Ketcham shows, among other things, that during the time in question he was Attorney-General of the State, and sets out the particular public duties in which he was at the times in question constantly engaged,

and which called him away from his office on the three days following the 8th day of May; that he maintained a private office where he kept assistants to whom it was his universal custom to refer matters of entering appearances and filing pleadings in his private practice, and to whom was left the duty of attending to all matters connected with cases pending in court up to the time of the actual trial; that on May 8th, he received a letter inclosing a copy of the summons and intending to send them to his private office asking his assistants to attend to the case, as was his custom in such matters; that he did not send the letter and summons, but left them on his desk where, either by the carelessness of the janitor or of some one unknown to the affiant, they became covered up with other papers and thenceforth escaped his attention; that affiant supposed he had sent the papers to his assistants and acted upon that belief, until June 4th following when his attention was called to the fact that no appearance had been entered and that judgment had been taken by default; that he immediately investigated the matter and then learned that he had not sent to his private office the letter and summons, but that they still remained on his desk under some papers of matters that had been disposed of and that were not requiring attention. It is also shown that the application is not made for delay but for the purpose of being permitted to defend the action and that, upon a hearing, appellee will show there is no liability against it as stated in the complaint.

While the counter-affidavit does not in terms contradict any particular averment contained in the affidavits in behalf of appellee, yet it is in conflict with the showing made by them, and is intended to controvert facts tending to show excusable neglect, mistake and inadvertence. In such cases the affidavits partake of the nature of depositions and parol testimony, and not of the nature of documentary evidence; and the rule applied to parol testimony must be applied to them. The court's conclusion will not be disturbed if it is

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supported by any evidence and, unless there is a clear failure to prove, it must stand. *Nash v. Cars*, 92 Ind. 216; *Carter v. Plate Glass Co.*, 85 Ind. 180; *Williams v. Grooms*, 122 Ind. 391; *Murrer v. Security Co.*, 131 Ind. 35; *Devenbaugh v. Nifer*, 3 Ind. App. 379; *Wells v. Bradley*, 3 Ind. App. 278.

It appears that at the time in question Mr. Ketcham was the Attorney-General of Indiana, and it is argued that he could not legally engage in the private practice of law during his term of office. This question can not be thus raised by appellant unless we could say that, because of his official position, a contract of private employment was void; and this we can not do. There is no constitutional or statutory inhibition against his accepting such employment. The legislature has at different times provided that certain designated public officers shall not practice law, but the Attorney-General is not of the number. Whatever reason may have been in the minds of the legislators when the statutes were enacted must have been considered by them not applicable to public officers not named. We think the maxim "*expressio unius est exclusio alterius*" applies to such cases. See *Howe v. Independence, etc., Co.*, 29 Cal. 72; *Hill v. Crump*, 24 Ind. 291.

Whether or not the affidavits show mistake, inadvertence or excusable neglect is a question of fact. If the term "excusable neglect" had a fixed legal meaning, the question would be different. In such case all the facts are to be considered in determining whether the one essential fact of excusable neglect is shown. The case does not rest upon a number of essential elements, the proof as to one of which there is a failure. In such case there must be evidence to show the inferential fact of excusable neglect. This evidence may be slight, but if there is some evidence it will control on appeal. If the evidence of the moving party shows inexcusable neglect, or if the facts are undisputed and the conclusion to be drawn from those facts is indis-

putable, the question for the trial court is then one of law. But unless the court can say that there is no evidence showing excusable neglect, or that the moving party has himself shown inexcusable neglect, the question is one of fact.

As we view the facts set out in the affidavits they tend to sustain the finding of inadvertence and excusable neglect. This evidence might be differently viewed by different courts, but the question here is, was there evidence to sustain the finding? As stated in *Williams v. Grooms*, 122 Ind. 391: "Where, upon a complaint or motion to set aside a default, affidavits and counter-affidavits are heard, the settled rule is that the decision of the court will not be interfered with in case it is supported by any evidence."

What some courts have held constitutes mistake, inadvertence or excusable neglect, would in other courts be held differently, and that the question is one to be determined by the particular facts of each case is shown by an examination of the following among a large number of cases upon the subject: *Ellis v. Butler*, 78 Iowa 632, 43 N. W. 459; *Heaps v. Hoopes*, 68 Md. 383, 12 Atl. 882; *Capital Savings Bank v. Swan*, 100 Iowa 718, 69 N. W. 1065; *Johnson v. Eldred*, 13 Wis. 539; *Freeman v. Brown*, 55 Cal. 465; *Hewitt v. Hazard*, 53 N. Y. Supp. 340; *Ordway v. Suchard*, 31 Iowa 481; *Hardman Co. v. Consolidated, etc., Co.*, (S. D.) 77 N. W. 1022; *Crescent Brewing Co. v. Cullins*, 125 Ind. 110; *Cruse v. Cunningham*, 79 Ind. 402; *Green v. Stobo*, 118 Ind. 332; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 310; *Griel v. Vernon*, 65 N. C. 76.

In *Ordway v. Suchard*, *supra*, the action of the trial court refusing to set aside a default was reversed, where it was shown that the failure of the attorney to answer in time resulted from the accidental misplacing of the papers in the case whereby they were overlooked and not discovered till near the close of the last term, the same being the first term after the commencement of the suit, and immediately on the discovery the motion to set aside the

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default was made and within three or four days after the default was taken.

Appellant's counsel argues that the cases of *Kreite v. Kreite*, 93 Ind. 583, and *Baltimore, etc., R. Co. v. Flinn*, 2 Ind. App. 55, are decisive of the case at bar. But each of these cases, as are all cases of this character, was decided upon its own particular facts, and an examination of them will show that the facts in neither of them are similar to those in the case at bar. In the *Kreite* case appellant was sued, process returnable Sept. 9, 1882, and had employed an attorney who appeared and pretended to set up an answer and afterward, Sept. 27, 1882, knowing appellant had a valid and complete defense and without any authority from appellant and without his knowledge or consent, wrongfully agreed, suffered and permitted a judgment to be rendered; that appellant did not know of such action until March 15, 1883, when execution was issued. On appeal the action of the trial court refusing to set aside the judgment was affirmed. The opinion intimates that appellant's remedy was against the attorney and not to be relieved from the judgment. In the *Flinn* case the Appellate Court affirmed the trial court's action refusing to set aside the default. The default in that case resulted really from a mistaken impression on the part of the attorney as to when the term of court began. It was not shown that he made any inquiry at all as to when the term did begin, nor that he was in any way misled. He had received the summons, which, if he had read, would have informed him when the court convened. He had received the summons in December and said he had overlooked the case until the 20th day of the following month. No excuse is given for the oversight, and so far as is shown he might at any time have consulted the summons and informed himself.

In *Davis v. Steuben School Township*, 19 Ind. App. 694, cited by counsel, appellant obtained a judgment against appellee upon default, while one Starry was trustee. After he

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was succeeded by one Chandler, as trustee, appellee, by proceedings under §399 Burns 1894, sought to have the default set aside and judgment vacated. It was held that the township must act through its trustee, and that as the affidavit showed that the former trustee had failed and neglected to defend the action and had corruptly and unlawfully suffered the judgment to be rendered, the relief asked under the above section could not be granted. There was no showing whatever that the judgment was taken through mistake, inadvertence, surprise, or excusable neglect.

But, in such cases as this, we think it is within the sound discretion of the trial court to relieve the party from the judgment and permit him to plead, or to refuse the application, and that we may review such action of the court it must appear there has been an abuse of that discretion.

Section 99 of the code of 1852 provides as follows: "The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and at any time within one year relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect and supply an omission in any proceedings."

The above section, as amended in 1867, reads: "The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect and supply an omission in any proceedings on complaint or motion filed within two years." §399 Burns 1894, §396 Horner 1897.

Appellant's counsel argues that under §399, *supra*, no discretion is vested in the trial court, and that the discretion vested under section 99, *supra*, was taken away by section 399. *Smith v. Noe*, 30 Ind. 117; *Bush v. Bush*, 46 Ind. 70; *Phelps v. Osgood*, 34 Ind. 150.

These cases are to the effect that the discretion, under

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the old code, to grant relief, becomes an imperative duty under §399 *supra* to relieve from a judgment taken through mistake, inadvertence, surprise or excusable neglect. The legislature intended, as said in one of these cases, to adopt a more liberal practice in such cases by excluding the idea of any mere discretionary power in the court in granting or refusing the application. But, from the more recent holdings of the courts, we do not understand that the legal discretion to grant relief from a default was completely taken away by section 399.

In *Hoag v. Old People's, etc., Soc.*, 1 Ind. App. 28, where, among other reasons argued, it was insisted that the evidence upon which the application was submitted was wholly insufficient to set aside the default and judgment, the court said: "The courts, even independently of statutes, possess and exercise a very large discretion in vacating judgments by default, for the purpose of permitting a defense to be made on the merits, and in deciding upon the question of diligence the action of the court will be reviewed only in extreme cases, involving an abuse of the discretion vested in the court. Freeman on Judg. §541, and authorities cited." *Decker v. Graves*, 10 Ind. App. 25; *Dallin v. McIvor*, 12 Ind. App. 150.

In *Cruse v. Cunningham*, 79 Ind. 402, in speaking of the action of the trial court in setting aside a default upon application made under the above section, the court said: "We think that, under the circumstances stated in the appellee's affidavit, there was some excuse for him, and that the action of the court in setting aside the default and permitting said appellee to plead was a reasonable exercise of discretion, not available as error".

Without entering upon a critical examination of the definition of terms, it may be said that judicial discretion is never the arbitrary will of the judge. "When they [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion in discerning the course prescribed by law, and

when that is discerned it is the duty of the court to follow it." *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. ed. 204.

Although the statute, without saying anything about discretion, gives a party the right to a new trial for certain reasons, yet the trial court is no more than exercising a legal discretion in granting a new trial, and if there is no abuse of discretion, the court's action will not be reviewed. *Barnes v. Bayless*, 134 Ind. 600.

In *Comstock v. Whitworth*, 75 Ind. 129, the court said: "The rule which has been adopted in reference to errors assigned upon the action of the courts, in granting new trials, would seem to be equally applicable to the setting aside of a default, of which the practical result is the same." See *Winer v. Mast*, 146 Ind. 177; Elliott's Gen. Prac. §1032; *Carthage, etc., Co. v. Overman*, 19 Ind. App. 309; *Nagle v. Hornberger*, 6 Ind. 69; *Leppar v. Enderton*, 9 Ind. 353; *Hust v. Conn*, 12 Ind. 257; *Saint v. State*, 68 Ind. 128; *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Leary v. Ebert*, 72 Ind. 418; *Fitzpatrick v. Papa*, 89 Ind. 17; *Collingwood v. Indianapolis, etc., R. Co.*, 54 Ind. 15; *House v. Wright*, 22 Ind. 383.

It is quite true that when a complainant has taken the steps prescribed by law, he is entitled to a judgment upon default and that such action of a court can be set aside only for cause shown. But it is and has always been the policy of the law to dispose of cases upon their merits, and a statute providing for the opening or vacation of a judgment by default, being remedial in its nature, should be liberally construed. An examination of the many cases, some of which we have cited, will disclose that appellate courts are very reluctant to disturb the trial court's action setting aside a default and permitting a trial upon the merits. And where, as here, the application is made so soon after the default and judgment are taken as that no considerable delay is occasioned by permitting a defense on the merits,

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where the moving party makes a showing of a defense on the merits which is *prima facie* meritorious; where it is not shown that such action would necessarily result in any injustice to appellant's substantial rights; where, upon the relief being granted, an answer is at once filed putting the case at issue; where it is not shown the party could not have had a full, fair and speedy trial upon the merits; and where there is some showing that the default resulted from excusable neglect and inadvertence; we can not say there was such an abuse of discretion as would authorize us in disturbing the conclusion reached by the trial court. And even though there should be some doubt as to the sufficiency of the showing of excusable neglect and inadvertence, we believe, as is said in *Watson v. San Francisco, etc., R. Co.*, 41 Cal. 17, in speaking of a similar application, that "It is better, as a general rule, that the doubt should be resolved in favor of the application." See *Watson v. San Francisco, etc., R. Co.*, *supra*; *Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Harbaugh v. Honey Lake, etc., Co.*, 109 Cal. 70, 41 Pac. 792; *First Nat. Bank v. Brown (Iowa)*, 77 N. W. 507; *Ordway v. Suchard*, 31 Iowa 481; *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559; *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910; *Westphal v. Clark*, 46 Iowa 262; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Seymour v. Elmer*, 4 E. D. Smith 199; *Whiteside v. Logan*, 7 Mont. 273, 17 Pac. 34; *Simpkins v. White*, 43 W. Va. 200, 27 S. E. 241.

Judgment affirmed.

THE LAFAYETTE CARPET COMPANY v. STAFFORD, BY
HIS NEXT FRIEND.

[No. 2,915, Filed June 26, 1900.]

MASTER AND SERVANT.—Injury to Servant.—Defective Machinery.—Complaint.—In an action by a servant for injuries caused by an uncovered and defective yarn-drying machine, a complaint alleging

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that plaintiff was eighteen years of age, was uninstructed as to the dangerous condition of the machine, and that the working place was a narrow passageway in which it was difficult to see because of dense steam, but which failed to aver that plaintiff was ignorant of the conditions, or that defendant knew plaintiff's age, inexperience and ignorance of the conditions, is insufficient. *pp. 189, 190.*

MASTER AND SERVANT.—*Failure of Master to Keep Machinery in Repair.—Injury to Servant.—Complaint.*—In an action by a servant for damages for personal injuries caused by the negligence of master to keep machinery in repair, a complaint describing the defects of the machinery, but containing no averment that the want of repair causing the injury was that to which the negligence was charged, is insufficient. *p. 191.*

SAME.—*Defective Machinery.—Complaint.—Contributory Negligence.*—In an action by a servant for injuries the complaint alleged that while plaintiff was in the performance of his duties, without any negligence on his part, certain yarn carried by plaintiff was caught in defective and uncovered yarn-drying machinery pulling his arm against such machinery and twisting it off. *Held*, insufficient for the reason that the allegations that the plaintiff was free from contributory negligence only showed freedom from fault up to the time the yarn was caught, and not to the time of the injury. *pp. 196-201.*

From the Tippecanoe Superior Court. *Reversed.*

C. G. Stuart, W. V. Stuart, E. P. Hammond, E. P. Hammond, Jr., and D. W. Simms, for appellant.

C. E. Thompson and D. E. Storms, for appellee.

COMSTOCK, J.—On January 12, 1897, appellee, then lacking eight days of being nineteen years of age, while in the employment of appellant, lost his left arm by falling into the “whizzer”, a machine used for the purpose of extracting water from yarn. His amended complaint to recover damages for said injury was in three paragraphs. Appellant demurred to each paragraph for want of facts sufficient to constitute a cause of action. The demurrer was sustained as to the second, and overruled as to the first and third paragraphs, to which rulings, as to the first and third paragraphs, appellant excepted. Appellant answered by the general denial. There was a trial by jury, and a general verdict returned in favor of appellee assessing his damages at

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\$1,650. With their general verdict, the jury also returned answers to interrogatories submitted by appellant. Appellant filed a written motion for judgment in its favor on the special findings of the jury in answer to interrogatories, notwithstanding the general verdict. It also moved for judgment in its favor upon the statements in the pleadings, notwithstanding the general verdict. These motions were overruled and exceptions duly taken. The court sustained appellee's motion for judgment on the general verdict, to which ruling appellant excepted, and judgment was rendered in favor of appellee for the amount of the verdict. The foregoing adverse rulings to the appellant are assigned as error.

The whizzer into which appellee fell and received his injury is thus described in the complaint: "That said whizzer is made of a large circular iron frame which rises from floor to a height of about two feet, with a top rim about three and one-half to four inches wide; that said iron frame was about four feet in diameter; that arising from said iron rim there were three iron beams bolted onto the said rim, which rises in a circular direction, and meet about two and one-half feet above the center of the plane of the iron rim, and there forming the upper boxing for the spindle, which spindle extends down through the center of the iron frame into a lower boxing; that fastened on the bottom of said spindle and immediately above the lower boxing, and inside of said iron frame, is a circular tub, made of wood and iron the top rim of which is wood, placed thereon in sections, which fit closely together when placed thereon properly, and when said rim is in proper repair. That said top wooden rim of said tub was nearly on a level with the rim of said iron frame and formed a circle inside and closer to the center than said iron frame so that it was exposed and unprotected. That said three iron beams arising from said rim were located on the north, west and south side of said frame, form a semi-circumference, and

left an open space of one-half the circumference on the east side of said whizzer."

It is averred in both paragraphs of the complaint that appellee was eighteen years of age at the time of his injury; that appellant failed to give him any instructions as to the dangerous condition of the machine; but there is no averment that appellee did not know that the machine was uncovered, nor that he did not know of the danger of operating the machine; nor that he was inexperienced; nor that appellant knew his age and inexperience. It is also averred that appellee worked in a narrow passageway in which it was difficult to see because of the dense steam, but it does not aver that appellee was ignorant of these conditions. These averments were not sufficient, therefore, to charge negligence on the part of appellant as to the whizzer being uncovered, and as to the narrow passageway and the presence of the steam. There was no absolute duty on the part of the appellant to cover the whizzer. *Guedelhofer v. Erns-ting*, 23 Ind. App. 188, and authorities there cited. See, also, *Stephenson v. Duncan* (Wis.), 41 N. W. 337; *Naylor v. Chicago, etc., R. Co.*, 53 Wis. 661; *Hobbs v. Stauer*, 62 Wis. 108, 22 N. W. 153; *Foley v. Machine Works*, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51; *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368; *Goodenow v. Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Murphy v. Rubber Co.*, 159 Mass. 266, 34 N. E. 268; *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255; *Stuart v. West End St. R. Co.*, 163 Mass. 391, 40 N. E. 180; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Schroeder v. Michigan, etc., Co.*, 56 Mich. 132, 22 N. W. 220; *Coombs v. N. B. Cordage Co.*, 102 Mass. 572, *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Palmer v. Harrison*, 57 Mich. 182, 23 N. W. 624; *Young v. Burlington, etc., Co.*, 79 Iowa 415, 44 N. W. 693; *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440; *Larson v. Knapp, etc., Co.*, 98 Wis. 178, 73 N. W. 992; *Mackin v. Alaska, etc., Co.*, 100 Mich. 276, 58 N. W. 999.

Counsel for appellee say in their able brief that the stat-

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ute required appellant to cover its machinery, quoting §7087h, Burns Supp. 1897, (Acts 1897, p. 101, §8). This act, however, even if applicable to the case before us, did not go into effect until after appellee received his injury.

The objections to the first and third paragraphs of the amended complaint are: (1) That they are insufficient for failing to aver directly, or stating facts showing, that appellee's injuries occurred through the negligence of the appellant, and in failing to show that the alleged defects in the rim or spindle were the proximate cause of such injuries; (2) that they are insufficient for want of averments, or statement of facts, showing that appellee's injuries were received without fault or negligence upon his part.

The negligence charged against appellant in the first paragraph of complaint is that "defendant neglected its duty and failed to keep said machine in repair", especially that part known as the rim of the tub; that said rim was made of wood and was out of repair in this, that the sections were loose and the joints of the same did not come close together, and that said rim was worn rough so that parts (commonly called splints or slivers) of the top and edge projected slightly above the surface of the same. "In consequence of the rim of said tub being out of repair, the yarn which he was carrying on his left arm was caught by the rough part of said rim," etc.

There is no averment that the want of repair was the same before stated; nor that any act or omission of appellant was the cause of the yarn catching in the rim. The fact that the rim was out of repair and caused the yarn to catch may have been a different defect from that with which appellant is charged with being negligent. Presumptions will not be indulged in favor of the pleader.

The averment of negligence in the third paragraph follows the description of the defects in the spindle, and is as follows: "Defendant neglected its duty and failed to place any covering or netting over said rear of said whizzer and spindle and failed to keep said machine in repair, especially

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that part of said machine known as the spindle." The want of repair of the spindle is thus described: "Said spindle was made of iron and the same was out of repair in this: That the part below the top boxing which held the top of said spindle was rough and covered with oil and dust." It is claimed by counsel for appellant that the foregoing averment does not charge any act of negligence causing appellee's injury. It charges that appellant failed to keep or place any covering over the rear of the whizzer and spindle and especially failed to keep the machine in repair, particularly the spindle, but does not aver that appellee's injury was caused by appellant's negligence. Nor does it appear from the facts pleaded that appellant's negligence caused appellee's injury.

In *Pennsylvania Co. v. Gallentine*, 77 Ind. 322, 324, it was averred: "That the said defendant cut down the grass and weeds growing on the track and grounds of said railroad at said point, and permitted large quantities of other inflammable material to accumulate on said road and grounds, at said point, and negligently permitted said grass, weeds and other inflammable material to remain on the track and grounds of said road as aforesaid, until they become very dry, when on the — day of —, 1872, they were set on fire by the passing trains, negligently run and operated on said road by the defendants, and the fire from said burning grass, weeds and other inflammable material, was communicated to said wood, and it was then and there burned. Wherefore the plaintiff was damaged," etc. The complaint was held bad, the court, at page 325, saying: "It avers 'that the wood was set on fire by the passing trains, negligently run and operated on said road by the defendant, and burned;' but it does not aver that the negligence had anything to do with the setting on fire and the burning of the wood, or that the injury was caused by, or resulted from, the negligence of the defendant."

In *Corporation of Bluffton v. Mathews*, 92 Ind. 213,

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being an action against the town for an injury received by the plaintiff in falling into an excavation, the complaint charged: "That said incorporated town of Bluffton and said Morgan suffered and permitted said two excavations in said sidewalk to be made, and negligently, wrongfully and unjustly suffered and permitted the same to remain open, and the passage of said sidewalk to be obstructed and rendered dangerous to persons passing along said sidewalk along said lot, for a long and unreasonable length of time, to wit, for the space of about five weeks; that said sidewalk was constantly frequented and used by persons passing to and fro by said lot; that 'the said defendant' negligently, wrongfully and unjustly left the said excavations in said sidewalk along said lot uncovered and unprotected, and without any barriers or guards to prevent persons passing along said sidewalk and lot from falling into said excavations in said sidewalk; that on the 24th of October, 1881, the said defendant negligently left, suffered and permitted said excavations in said sidewalk along said lot to be uncovered, and without any guards or barriers or lights, to prevent persons from falling into said excavations while passing along said sidewalk and lot with due caution; that on the evening of the — day of —, 1881, plaintiff, without any fault or negligence on her part, and while with due caution passing along said sidewalk, was precipitated and fell into said excavation in said sidewalk, to the depth of said excavation, and striking the bottom thereof with great force and violence, by means whereof she was greatly injured, and was sick and sore for a long time, and suffered greatly, and paid out large sums of money, to wit, \$500 for medical and surgical treatment, and suffered damages in the sum of \$5,000. Wherefore," etc. The complaint was held insufficient, the court saying: "To render the appellant liable it was necessary to show in the complaint, by the averment of issuable facts, a wrong on the part of the appellant

and damage to the appellee, and the wrong was the proximate cause of the damage. The complaint did not show that when the appellee was injured the appellant was chargeable with fault, or that her injury was caused by the appellant's wrongful act or omission." In *Pittsburgh, etc., R. Co. v. Conn*, 104 Ind. 64, an action against a railroad company to recover damages for injuries caused by its alleged negligence, it was held that the complaint must not only charge the defendant with the negligent acts, whether of commission or omission, but also show with reasonable certainty that such acts were the direct or proximate cause of the accident or injury: That "in such case, the allegation in the complaint, that the defendant, with gross negligence and in a careless and reckless manner, caused one of its locomotives, then and there operated by its servants and agents, to rapidly approach the street crossing where the accident occurred, without having the headlight lit in said locomotive, and without giving any reasonable, timely, or proper warning, notice, or signal of its approach, either by ringing the bell or blowing the whistle at a safe and reasonable distance from said crossing, fails to show that the accident or injury was caused by the negligence of the defendant."

In *Harris v. Board, etc.*, 121 Ind. 299, it is stated: "The complaint of the appellant alleges that a bridge, forming part of one of the highways, was negligently suffered to get out of repair, and become unsafe; that the board of commissioners had notice of its condition; that the appellant's horse, which he was riding over the bridge, was injured, without any fault on the appellant's part." The complaint was held bad, the court saying: "To sustain a recovery there must, in every instance, be a connection between the wrong and the injury. In other words, the plaintiff must show that the unsafe condition of the bridge was the proximate cause of the injury for which he sues. There is no such showing in this case. It does appear that the bridge was unsafe, and that the plaintiff's horse was injured; but

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it is not shown that there was any connection between the two facts."

In *Ohio, etc., R. Co. v. Engrer*, 4 Ind. App. 261, which was for an injury received at a crossing, the complaint charged that the defendant "negligently and carelessly omitted to give any signal of its approach by bell, whistle or otherwise," and "while said locomotive and cars were being run in the negligent and careless manner aforesaid," the plaintiff was struck and injured, etc., and then alleged that "the foregoing injuries were occasioned by the negligence and carelessness of the defendant," etc. The court said: "The injury must be shown to have been caused or occasioned by some act or omission which is alleged to have been negligent. In the complaint before us, after the description of the injuries suffered, it is alleged that they were occasioned by the negligence and carelessness of the appellant. In this connection no act or omission is mentioned, and no reference is here made to any act or omission or any negligence before mentioned. In the former part of the complaint it is alleged that the appellant caused its locomotive and train to pass rapidly along the railroad track and over the crossing, and in so doing negligently and carelessly omitted to give any signal of its approach by bell, whistle, or otherwise, and that while said locomotive and train were being run along said track and over said crossing in the negligent and careless manner aforesaid the same ran against the appellee, etc. It is not shown that the injury alleged was caused by any act or omission stated. This was a material defect. The appellant was entitled to a statement of the cause of action in plain and concise language, showing that the alleged injury was caused or occasioned by some act or omission stated and alleged to have been negligent."

In *Peerless Stone Co. v. Wray*, 10 Ind. App. 324, it was held: "In an action for damages for personal injury, the complaint is fatally defective where it does not appear, by direct allegations or necessary inference, that the injuries complained of were the result of defendant's negligence."

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In *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35, it was held: "In an action against a railroad company for damages for the killing of plaintiff's intestate at a crossing, a complaint which alleges that defendant negligently piled lumber on its right of way which obstructed the view of travelers on the street, and that the persons managing defendant's train at the time plaintiff's intestate was killed, failed and neglected to sound the whistle or ring the bell in approaching the crossing, and were negligently running the train at an unlawful rate of speed, which complaint does not further aver that the view of decedent was obstructed by the lumber, or that the failure to give the signals, or the unlawful speed of the train caused the injury, does not state a cause of action. See, also, *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, and authorities there cited.

The following portions of the first paragraph of complaint contain the averments as to want of contributory negligence: "That on the 12th day of January, 1897, while said tub in said whizzer was being operated with great power and velocity by the steam engine located in said room, and while said plaintiff, who was a minor eighteen years old, was engaged in passing through said narrow passageway in the rear of said machine through which he was compelled to go by orders of the defendant and putting yarn on the said poles so placed aforesaid, as it was his duty to do, and without any fault or negligence on his part, and in consequence of the rear of said machine being uncovered and unprotected, and in consequence of the rim of said tub being out of repair, and in consequence of said narrow passageway, the lower part of the yarn which he was carrying on his left arm was caught by the rough part of said rim, carried around until it came in contact with the said spindle which revolves said tub, and said yarn was quickly wrapped around said spindle, pulling the left arm of plaintiff up against said spindle and twisting it off", etc.

The averments of want of contributory negligence of the

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third paragraph are identical in language with those of the first, to and including "and without any fault or negligence on his part". They then proceed: "And in consequence of the rear of said machine being uncovered and unprotected and out of repair, as aforesaid, and in consequence of the said narrow passageway, the dry yarn which he was carrying on his left arm was caught by the rough part of the top of said spindle, immediately below the upper boxing which held the top of said spindle, pulling the left arm of plaintiff up against said spindle and twisting it off."

In the first paragraph it is averred that appellee was without fault or negligence until the yarn was caught by the rough part of said rim, and in the third until it was caught by the spindle.

Counsel for appellant claim that this is not sufficient; that the averment should show freedom from fault up to the time of the injury. It is pointed out that appellee might have been negligent in not jerking the yarn away from the rim before it was wound so as to be brought in contact with the spindle, or he might have been negligent in letting the yarn slip from his arm before it pulled up against the spindle. It is insisted that the words "without fault" can only apply to acts which precede them. It is quite clear that under the rules of construction these words apply to preceding statements.

In *Riest v. City of Goshen*, 42 Ind. 339, it is said: "The averment must be either expressly made in the complaint, that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case." In that case, it was alleged that the plaintiff's servant, "when entering upon the west end of the said bridge, after the said horses had fully gained the same, and being entirely upon it, and while they were making ordinary effort to raise and draw forward the wagon so laden, as aforesaid, upon the said bridge, as aforesaid, within the corporate limits of said

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city aforesaid, and while using due and reasonable care on his part, the said bridge broke down and gave way." The averment as to want of contributory negligence was held insufficient, the court saying: "The allegation is, that the servant used due and reasonable care after the team and wagon had gotten upon the bridge, but it is not averred that he used due and reasonable care in driving upon, and attempting to cross the bridge; nor is it alleged that the plaintiff and his servant were ignorant of the true condition of the bridge. If it had been alleged that the injury had occurred without the fault or negligence of the plaintiff, this allegation would have been sufficient, unless it plainly and clearly appeared, from the other facts stated, that the injury had been produced by the fault and negligence of the plaintiff. The allegation of the complaint, that the servant of the plaintiff used due and ordinary care after the team and wagon were upon the bridge, is not equivalent to the allegation that the injury was caused without the fault or negligence of the plaintiff."

In *Wabash, etc., R. Co. v. Johnson*, 96 Ind. 40, the court, referring to the complaint in that case, said: "In the complaint before us the allegation is that the fire was suffered to escape through the negligence of the defendant and without the fault of the plaintiff, but it is not averred that the loss resulted without any negligence of the plaintiff. The allegation of the pleading is confined to the act of suffering the escape of the fire, and by no rule of construction can it be extended to embrace the loss or injury. It may be true, as the complaint charges, that the fire did escape through appellant's negligence, and without any contributory negligence on the part of the appellee, and yet there be no right of action. The express averment falls far short of showing that the appellee was free from contributory negligence. It is one thing to aver that the fire escaped without the negligence of the plaintiff, and quite another to show that he did not contribute to the injury, for his contribution may have

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been in some matter occurring before or after the fire was suffered to escape. It is not sufficient to show freedom from negligence on one point out of several; the care incumbent upon the plaintiff must extend to all points material to his cause of action."

In *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35, it was held: "In an action against a railroad company for the killing of plaintiff's intestate, an allegation that the intestate while passing over said crossing, without carelessness or negligence on his part, and while using due care and caution, was struck by a train, does not negative contributory negligence, as he might have been negligent before going upon the crossing."

In *Romona, etc., Co. v. Johnson*, 6 Ind. App. 550, 552, the complaint averred: "That on the 5th day of August, 1890, and while plaintiff was in the employ of defendant, and while in the line of his said duties, and while operating and managing said hoisting machinery, and without any fault whatever of plaintiff, the rope passing over said broken and unsafe pulley ran off said pulley by reason of said broken and unsafe condition, and became and was entangled in the machinery and boxing about said pulley, thereby hindering, obstructing, and stopping the movements and operation of said machinery; that thereupon plaintiff, with one Luther Pryor, a servant and employe of said defendant, attempted to extricate and remove said rope from said machinery and boxing, and to replace the same upon said pulley; that while plaintiff and said Pryor were so engaged in the attempt to remove, extricate, and readjust said rope, and while in the line of plaintiff's duty as such servant and employe of defendant, and without any fault of plaintiff or said Pryor, the said rope suddenly became loose and disentangled, thereby causing the same to jerk, swing, and vibrate violently, striking plaintiff about his face and head, and knocking said plaintiff from said machinery to the ground." The complaint was held insufficient. The

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court said: "It is well settled that 'the averment must be either expressly made in the complaint that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case'. *Riest v. City of Goshen*, 42 Ind. 339, 341, and authorities cited. There is no general allegation in the complaint that the injury was caused without appellee's fault or negligence. The appellee may have been entirely free from fault as to the rope becoming loose and disentangled, and yet, for aught that appears in the complaint, guilty of negligence in placing himself where it should injure him, or he may have been in fault in allowing a heavy weight to hang on the end of the rope, unsupported, while engaged in his efforts to replace the rope on the pulley, so that such weight, when the rope became loose, would cause it to jerk and vibrate, and thus injure him in the manner stated in the complaint."

In *Lake Erie, etc., R. Co. v. Hancock*, 15 Ind. App. 104, 108, the court, holding the complaint bad for lack of sufficient averment that the injury occurred without the fault or negligence of the plaintiff, said: "There is in the complaint before us no averment that the appellee's injury was received without any fault or negligence on her part. The allegation concerning her freedom from fault is that by reason of the defendant's negligence, 'and without any fault or negligence on the part of the plaintiff, the said locomotive came in close proximity to said horse and plaintiff while then and there attempting to cross said railroad at said point, and frightened said horse, and caused him to turn around and upset or turn said buggy over and throw plaintiff with great force and violence to the ground, fracturing her skull,' and otherwise injuring her. This is an allegation that the plaintiff was free from fault in respect of the coming of the locomotive in close proximity to the horse and the plaintiff, but not that she was free from fault in receiving the injury. What follows after the averment as

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to the coming of the locomotive is only a recital of what resulted from such act of the near approach of the engine to the horse and the appellee. The result was that the horse became frightened and turned around and upset the vehicle, throwing the appellee with great force and violence to the ground, and injuring her. But we are not apprised of what transpired between the time the appellant set in motion the cause of the appellee's injury and the happening of the result. The appellee may have been quite faultless in relation to the act which brought the locomotive engine and horse together, and yet she may have been negligent in occupying a careless position in the wagon while attempting to cross the track, or in doing some other act, between the time the engine came in close proximity to her horse and the time appellee was hurt."

The foregoing authorities are cited, not for the purpose of showing that in an action for negligence the plaintiff must be without fault, for the proposition is not questioned, but as cases illustrating the recognized rule. The case of *Lake Erie, etc., R. Co. v. Hancock*, 15 Ind. App. 104, is directly in point and would seem to be decisive of the question. The requirement lacking in the complaint may be said, as was said by Reinhard, J., in the case last cited: "The requirement is, of course, a technical one, but it is one of those which a long line of decisions holds can not be dispensed with unless the facts alleged otherwise show affirmatively that plaintiff was free from fault."

Counsel for appellee suggest that a correct result was reached, and that therefore if the rulings complained of were erroneous, they were harmless, and the judgment should be affirmed. We are not prepared to say from the entire record that a right result was reached.

Judgment reversed, with instructions to the trial court to sustain the demurrers to the first and third paragraphs of the amended complaint.

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BIERLY ET AL. v. ROYSE ET AL.

[No. 3,064. Filed June 26, 1900.]

LIENS.—*Tradesmen and Mechanics.—Common Law Lien.—Waiver.—*

Section 7268 *et seq.* Burns 1894 does not declare a lien, but provides the manner of enforcing a lien which a mechanic or tradesman has at common law, and under such statute a mill owner may enforce a lien on lumber, in his possession, for payment of his charges for sawing the same, and such lien is not limited to any given lot of lumber for the price of sawing the same, but extends to the quantity in his possession for any general balance due him, but where the mill owner voluntarily surrenders possession of lumber, such surrender operates as a waiver of the lien thereon.

From the Washington Circuit Court. *Affirmed.*

S. H. Mitchell and *F. P. Cauble*, for appellants.

F. M. Hostetter, *H. Morris* and *M. B. Hottel*, for appellees.

WILEY, J.—Appellants were the owners of and operating a portable sawmill. Under a contract with appellee Royse, they moved their mill to his farm for the purpose of sawing lumber for him from trees furnished to them by him. Under their contract they sawed 122,000 feet of lumber for which Royse agreed to pay them \$3.25 per thousand. Of this lumber appellee Royse sold appellees Morris & Morris 40,500 feet, and appellants objected to the removal of it until a balance of \$197.80 due them for sawing had been paid; and it was agreed that the firm of Morris & Morris should pay appellants said balance out of the proceeds of the money derived from the sale of such lumber. When this action was commenced, there yet remained in the mill-yard 15,000 feet of the lumber purchased by Morris & Morris. Appellee Royse was insolvent. These facts are gathered from the complaint.

The prayer of the complaint is for judgment; that the amount due be declared a lien on the lumber at the mill, and

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on the money derived from the sale of the lumber to Morris & Morris, and that the lumber at the mill be sold, etc.

The cause was put at issue by answer and reply; trial by the court, and a special finding of facts made, and conclusions of law stated thereon. As the only error assigned is that the court erred in its conclusions of law, we have not thought it necessary to refer to the pleadings at any length. The facts found by the court are: That appellants Bierly and Dunn were partners, and were operating a sawmill; that, under a contract with appellee Royse, they moved the mill to his farm to saw into lumber logs furnished by him, and for such sawing were to be paid by him \$3.25 per thousand feet, for all merchantable lumber, said payment to be made when the lumber was taken up from the mill-yard; that in pursuance to said contract a large amount of lumber was sawed and measured and taken away by Royse; that all logs that were large enough were to be quarter-sawed; that appellees Royse and Morris & Morris entered into a contract on or about May 13, 1898, whereby the latter were to have all the lumber thereafter sawed on the Royse farm; that the lumber was to be measured and taken up in lots of 15,000 or 20,000 feet, and was to be paid for within sixty days from delivery, and the money, or so much thereof as was necessary, was to be paid in discharge of a certain judgment against Royse; that Morris & Morris were also to pay a sufficient sum to pay the expenses of manufacturing and delivering the lumber so sold to them; that appellants were not parties to this contract, and knew nothing of it except as they had been informed; that before the commencement of this action a member of the firm of Morris & Morris went to the mill-yard for the purpose of removing lumber so purchased of Royse, when he was informed that the saw bill had not been paid, and appellants forbade him removing said lumber until said bill was paid; that, thereupon, said member of said firm informed appellants that it had been arranged in the contract

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between Royse and said firm of Morris & Morris that the saw bill should be paid; that upon this statement appellants permitted said firm to remove about 20,000 feet of the lumber, leaving in the mill-yard about 15,000 to 20,000 feet; that thereafter appellants demanded payment for sawing the lumber moved, and forbade said Morris & Morris and said Royse from removing any more lumber unless the saw bill should be paid when the lumber was removed. The court further found that the firm of Morris & Morris was not making any defense to the action, but was ready and willing to pay the money to the parties entitled thereto; that there is due from Royse to appellant a balance of \$178.25, and that Royse is insolvent. Upon these facts, the court stated its conclusions of law as follows: (1) That appellants had a lien on all the lumber sawed on the Royse farm; that they are entitled to a lien on all the lumber remaining in the mill-yard; that they were entitled to a lien upon the last lot of lumber removed by Morris & Morris; that said Morris & Morris are required to pay appellants for said lumber moved away only a sufficient sum to pay for sawing the lumber moved, over their objections, \$3.25 per thousand feet, there being 15,787 feet removed by them. (2) "That the court finds for the plaintiffs and against the defendant Royse on his cross-complaint."

Upon these conclusions of law, the court pronounced judgment as follows: "That appellants recover of the appellee Royse \$178.25, together with costs; that appellants have a lien upon, and are entitled to the possession of, the lumber yet in the mill-yard in the sum of \$178.25, which lien is subject to satisfaction according to the terms of §§7268, 7269 Burns 1894; that appellees Morris & Morris shall pay to appellants the debt owing by them to Royse for the lumber upon the debt by said Royse owing to said plaintiffs the sum of \$51.31 * * * which shall, when so paid, be a credit upon the above judgment, etc." and that Morris & Morris are not liable for costs.

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The first question which suggests itself for consideration is, what is the nature of the lien, if any, acquired by appellants upon the lumber which they sawed under their contract with Royse? If they acquired any lien, it was not a statutory but a common law lien. The legislature has not provided for acquiring a lien in such cases.

Appellants urge that they have a lien under §7268 Burns 1894, which provides: "Whenever any person shall intrust to any mechanic or tradesman materials to construct, alter or repair any article of value, such mechanic or tradesman, if the same be completed and not taken away, and his fair and reasonable charges not paid, may, after six months from the time such charges became due, sell the same;" etc. This section does not declare any lien, but merely provides a manner for enforcing a common law lien. *Watts, Tr., v. Sweeney*, 127 Ind. 116, 22 Am. St. 615. In that case, the Supreme Court, speaking of §5304 R. S. 1881 (being §7268 Burns 1894), said: "This section does not declare a lien, but provides the manner of enforcing a lien which the mechanic has at common law." In this action, therefore, appellants were not seeking to enforce a statutory lien, for there is no statute in this State creating such a lien. That being the case, their rights are governed by §§5304, 5305 R. S. 1881, being §§7268, 7269 Burns 1894, and the lien that the common law gives them can only be enforced by a compliance with the statute. *Watts, Tr., v. Sweeney, supra*. By those provisions, the lien can not be enforced until six months after the "charges become due", and then by sale after notice, etc.

The case of *Holderman v. Manier*, 104 Ind. 118, is in point. There appellee owned and operated a portable sawmill. One Klinehance contracted with Manier to move his sawmill to his farm, and to saw lumber out of logs furnished by him at an agreed price per thousand feet. Manier sawed a large amount of lumber, a part of which was moved by Klinehance and a part piled up in the mill-yard by a man

employed by Klinehance. The latter failed, and sold the lumber so piled up to appellants. They made a demand on Manier for the lumber, who refused to surrender possession of it until his charges for sawing were paid. Appellants refused to pay such charges, and brought an action in replevin to recover possession of the lumber. It was held that, where a mill owner contracts to saw lumber for another at a stipulated price per thousand feet, his lien is not limited to any given lot of lumber for the price of sawing the same, but extends to the quantity in his possession for any general balance due him. It was further held that the voluntary surrender of the possession of property upon which a lien is held operates as a waiver of the lien, but in that particular case it was held that the permission of appellee extended to an employe of Klinehance to pile up the lumber in the mill-yard was not a surrender of the possession of the lumber. That the voluntary surrender of the property in such case is a waiver of the lien, see, also, Indiana Stat. Liens, §1480; *Picquet v. McKay*, 2 Blackf. 465; *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410; *Tucker v. Taylor*, 53 Ind. 93; *Legg v. Willard*, 17 Pick. (Mass.) 140.

Each paragraph of the complaint and the special findings show a voluntary surrender of the possession of the lumber on the part of the appellants, and hence, as we have shown from the authorities cited, they waived their right to assert their lien. As to the lumber that still remained in the mill-yard, appellants have a lien for the general balance due them under their contract, and may enforce it under the statute. Under the authorities, the complaint did not state any cause of action against the appellees Morris & Morris, but they have not assigned any cross-errors, and in the brief of counsel they say: "But defendants have not assigned cross-error, and are making no complaint of the judgment." If there was any error committed by the trial court, it was against the appellees Morris & Morris, and of this appellants can not complain. Appellants were entitled to a personal

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judgment against appellee Royse for the balance due them, and were also entitled to enforce their common-law lien upon the lumber remaining in their possession. These the judgment gives them. They did not have any lien that could be enforced in an action of this character, and the record does not present any error to warrant a reversal.

Judgment affirmed.

THE HOME INSURANCE COMPANY v. SYLVESTER.

[No. 3,092. Filed June 26, 1900.]

INSURANCE.—Proof of Loss.—Waiver.—Where an insurance company has been notified of a loss under a policy issued by it, and denies liability and refuses to pay, such action constitutes a complete waiver of proof of loss. *pp. 208, 209.*

SAME.—Action.—Proof of Loss.—Waiver.—An action on an insurance policy was not prematurely brought under a provision in the policy that the company would pay the loss within sixty days after receiving proof of loss where it was shown that notice of the loss was given more than sixty days before bringing suit, and the company at such time denied liability and refused to pay. *pp. 209, 210.*

SAME.—Pleading.—Verification.—Non Est Factum.—Where an insurance company in defense to an action on a policy filed an answer alleging false representations in the application, a reply thereto that the application was made by defendant's agent is not a plea of *non est factum* and need not be verified. *pp. 210, 211.*

PLEADING.—Harmless Error.—Overruling a motion to strike out an argumentative denial is harmless error. *p. 211.*

INSURANCE.—Application.—False Representations.—Blanks Filled by Agent.—Where an agent of an insurance company, while acting in the scope of his authority, fills the blanks of an application for insurance with a statement not authorized by the party who signs it, the wrong will be imputed to the company and not to the insured. *pp. 211, 212.*

SAME.—Proof of Loss.—Waiver.—Evidence.—In an action on an insurance policy evidence that defendant by its authorized agent and adjuster notified plaintiff that the company would not pay the loss and he need not bother them about it was sufficient to establish a waiver of proof of loss. *pp. 212, 213.*

SAME.—Evidence.—Witnesses.—Opinion Evidence.—Witnesses who were farmers and who had built and owned barns, knew their values, and were acquainted with plaintiff's barn, and its condition

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before the fire, were competent to testify as to the value of such barn, in an action for its loss by fire. *p. 213.*

TRIAL.—Witnesses.—Cross-Examination.—The extent to which the cross-examination of a witness may be carried is largely within the discretion of the court, and a cause will not be reversed on account thereof unless it appears that such discretion has been abused to the injury of the complaining party. *pp. 213, 214.*

APPEAL AND ERROR.—References to Record.—Waiver.—Where a party fails to call the court's attention to the particular part of the record where the questions asked to be decided may be found he thereby waives his right to have them decided. *p. 214.*

INSTRUCTIONS.—Refusal to Give.—Where the jury is once fully and clearly instructed upon a given point the court is not required to repeat the instruction in different language. *pp. 214, 215.*

From the Madison Superior Court. *Affirmed.*

W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellant.

T. Bagot, A. Ellison and C. K. Bagot, for appellee.

WILEY, J.—Action by appellee against appellant upon an insurance policy to recover for loss of property occasioned by fire. Complaint in a single paragraph; answer in three paragraphs; reply in four paragraphs. A demurrer for want of facts was overruled to the complaint. Demurrers to the second and third paragraphs of answer and to the second and third paragraphs of reply were overruled. The case was tried by a jury, resulting in a verdict for appellee. Appellant moved for a new trial, which was overruled and judgment rendered on verdict. All of the above rulings, adverse to the appellant, are assigned as error. In the order of the argument of counsel, we will first discuss the sufficiency of the complaint.

Objection is urged to the complaint on the ground that there is no averment of proof of loss, and no sufficient averment showing a waiver of proof. The policy sued on contains these provisions: (a) That in case of loss, the assured was required to give appellant notice thereof within fifteen days, (b) make proof of loss within sixty days, and

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(c) that if the assured complied with all the conditions of the policy to be performed by him, appellant was to pay the loss within sixty days after receiving proof of the loss. The fire occurred June 22, 1897, and the building insured was totally destroyed. The complaint avers a performance of all the conditions of the policy on the part of appellee; that in less than fifteen days after the fire, he notified appellant of the loss in writing; that in two or three days thereafter, appellant waived any additional or other proof of loss by sending its adjuster to adjust the loss; that said adjuster proceeded to adjust the loss and notified appellee that said loss would not be paid in full and offered appellee money in settlement and did not ask him to furnish any proof; that thereafter, and within sixty days after the fire, appellant notified appellee that it would not pay said loss. These averments are sufficient to obviate the objections named. It is the firmly established rule in this State, that if an insurance company has been notified of a loss under a policy issued by it, and denies liability and refuses to pay, such facts constitute a complete waiver of proof of loss. *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400; *Little v. Phenix Ins. Co.*, 123 Mass. 380; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. 506; *Western Assurance Co. v. McCarty*, 18 Ind. App. 449; *National Ins. Co. v. Strebe*, 16 Ind. App. 110; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173.

It is also urged that the complaint shows that the action was prematurely brought. It is averred that appellee notified appellant of the loss June 23rd, and that within two or three days from that time appellant sent its adjuster to adjust and settle the loss; that said adjuster then notified the appellee that the loss would not be paid. This was a denial of liability, and as we have seen, a complete waiver of proof of loss. This denial of liability was not later than June 26th, as shown by the complaint, and as the record shows the action was commenced August 30th, the objection

urged to the complaint that the action was prematurely brought is without merit.

The next question discussed by appellant is the overruling of its motion to strike out the second and third paragraphs of reply. The motion was in writing and the reasons assigned are: (1) That neither of said paragraphs is verified; (2) that they are each an argumentative denial; and (3) that they do not contain averments sufficient to avoid the answer. These paragraphs of reply are directed to the second and third paragraphs of answer, and in these answers it is alleged that the policy sued on was issued upon a written application made and signed by appellee; that it contained certain warranties and representations which were alleged to be false and misleading; that they were made with that intent and purpose and did work fraud and deceit on appellant.

For the purpose of disposing of the motion to strike out these paragraphs of reply, it is not necessary to refer in detail to all the specific averments of the second and third paragraphs of answer. The second paragraph of reply avers that one Alexander was the agent of appellant and was authorized to solicit insurance for it; that when he made application for the policy sued on, he did not live near the property destroyed; that said Alexander came to appellee to solicit said insurance; that he had formerly taken applications to insure the same property; that he had with him a blank application; that appellee could neither read nor write; that Alexander knew said fact; that he informed said agent that he was not well acquainted with the condition of the property; that said Alexander, as such agent, told appellee that he was well acquainted with said property and had written insurance on it before, and that thereupon said Alexander filled in all the answers in said application upon his own knowledge, and that appellee signed it by his mark. The third paragraph of reply is substantially like the second, except it avers that appellee signed the application

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by his mark in blank upon the promise that said Alexander would correctly and honestly answer all the questions therein, and that in the absence of the appellee said Alexander did write all the answers in said application. The ruling of the court to strike out these paragraphs of the reply must be decided upon reasons assigned in the written motion. The first reason in the motion was that the paragraphs were not verified. It is urged that the replies were pleas of *non est factum* and hence were bad because not verified. We can not take this view of them. They were plead in bar of facts stated in the second and third paragraphs of answer, and it was not necessary that they be verified.

There is nothing in the second objection that the second and third paragraphs of reply were argumentative denials. If they did not amount to more than argumentative denials, overruling the motion to strike them out could not have harmed appellant, and even if it was error to overrule the motion, it would be no cause for reversal, because harmless. Courts do not reverse judgments for harmless errors. The objection that they state mostly evidentiary facts is not a sufficient ground upon which to base an error in refusing to strike them out. And the further objection that the averments are not sufficient to avoid the answer is not well taken. It is the settled law in this State that an agent of an insurance company, while acting within the scope of his authority, and who fills the blanks of an application for insurance, and it contains a misstatement not authorized by the party who signs it, the wrong, if any, will be imputed to the company and not the insured. *Pickel v. Phenix Ins. Co.*, 119 Ind. 291. In *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, a similar question was presented, and in deciding it the court said: "If the application contains any false statements, or answers to questions, it is the fault of appellee's agent. It was he who framed and wrote them, and procured the application to be signed containing them. * * * If any

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wrong was done, if any false statement was made, it was done and stated by appellee's agent, and it cannot take the benefit of a wrong committed by its own agent to defeat the payment of the loss." See *Howe v. Provident Fund Soc.*, 7 Ind. App. 586; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330; *Michigan Mut. Ins. Co. v. Leon*, 138 Ind. 636; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400.

Here each paragraph of reply shows that appellee did not live near the property insured; that he did not know the condition it was in; that he informed the agent of that fact; that the agent told him he knew the property well and would correctly fill the blanks; that he did fill them as they appeared; and that appellee had no part therein. It appearing that Alexander was the duly authorized agent of appellant to solicit and write insurance, it must be held that when acting in that capacity he was within the line of his duty and the scope of his authority, and the wrong, if any, in making false answers, was the wrong of the company and not of appellee, and that payment of the loss can not be thus avoided.

Counsel next discuss the overruling of the demurrer to the second and third paragraphs of reply. What we have said on the motion to strike out applies with equal force to the demurrer. Each of these paragraphs of reply was good, and the court correctly overruled the demurrer thereto.

The fifth specification of the assignment of error is that the court erred in overruling the motion for a new trial. The motion for a new trial contained sixty-three reasons. We will notice only those discussed. The first, second and third reasons, that the verdict is contrary to the law and the evidence and not supported by sufficient evidence may be considered together. The first question under this head discussed is that the evidence wholly fails to show that there was any proof of loss, or a waiver of such proof. Upon the latter proposition, there is an abundance of evidence showing a waiver, and the jury expressly find in answer to an

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interrogatory that appellant, by its authorized agent and adjuster, notified appellee that the company would not pay the loss, and he need not bother them about it. It having been established by competent evidence that appellant declined to pay the loss and denied liability, no proof of loss was necessary. Upon this proposition, we have above cited the authorities.

It is next urged that the court erred in permitting certain witnesses to testify as to the value of the property destroyed. The objection to their evidence rested upon the ground that they had not shown themselves competent to testify as to the value. These witnesses were farmers, who had built and owned barns, knew their value and were acquainted with appellee's barn and its condition before the fire. The court, in our judgment, did not err in admitting such evidence. But if such evidence was not properly admitted, it is evident that it was harmless, for the jury fixed the value at even less than appellant's adjuster placed it.

The eleventh, twelfth and thirteenth reasons for a new trial allege error of the court in sustaining objections to questions propounded appellee on cross-examination and in refusing to permit him to answer them. These questions propounded to appellee related (1) to a conversation with a person named pertaining to taking out an insurance policy on the barn before the policy in suit was issued; (2) to an examination of the barn by a former guardian of appellee, with a view of repairing it, and (3) to a conversation appellee had with his former guardian after the fire as to the value of the barn and what such former guardian said to him. Appellant's counsel have not suggested any tangible reason against the action of the court in sustaining these several objections upon which any reversible error can be predicated. The extent to which the cross-examination of a witness may be carried is largely under the control of the court, and a cause will not be reversed on account of the

discretion exercised by the court, unless it appears that such discretion has been abused to the injury of the complaining party. *Houk v. Branson*, 17 Ind. App. 119; *Shields v. State*, 149 Ind. 395; *Freeman v. Hutchinson*, 15 Ind. App. 639; *Payne v. Goldbach*, 14 Ind. App. 100; *Gilliland v. State*, 13 Ind. App. 651; *Chicago, etc., R. Co. v. Barnes*, 10 Ind. App. 460; *McDonald v. McDonald*, 142 Ind. 55; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

After a careful examination of the evidence in chief of appellee, we can not say that the trial court abused its discretion. Another reason why the court properly sustained the objections to these questions is that they were not pertinent to the examination in chief. It is settled law that the cross-examination of a witness must be confined to the general subject-matter upon which he testified on his examination in chief. *Siberry v. State*, 149 Ind. 684; *Miller v. Dill*, 149 Ind. 326; *Gemmell v. State*, 16 Ind. App. 154. There was no error in the rulings of the court under consideration.

As to the fifteenth and sixteenth reasons for a new trial, appellant has not called our attention to the particular part of the record where the questions asked to be decided may be found, and hence has waived its right to have them decided under rule twenty-five of this court and repeated decisions thereunder.

The seventeenth to the twenty-sixth reasons for a new trial, inclusive, relate to the admission and rejection of certain evidence. A detailed discussion of the many questions thus raised would require much time, without corresponding fruitful results. We have examined all such questions, and are clearly of the opinion that in its rulings relating thereto the trial court did not commit any reversible error.

The thirtieth to the sixty-second reasons for a new trial, inclusive, attack the action of the court in giving, in refusing to give, and in giving as modified certain specified instructions. From an examination of all the instructions

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given, we are clearly of the opinion that they fairly and fully stated the law within the issues and were applicable to the facts proved. Some of the instructions tendered by appellant and refused by the court correctly stated the law, but there was no error in refusing to give them, for the reason that the court had embraced in the instructions given the same subject-matter, and had fully stated the law in reference thereto. The instructions given, relating to the subject-matter covered by those refused, were substantially the same, and in such case it is not error to refuse to give a correct instruction. Where the jury is once fully and clearly instructed upon a given point the court is not required to repeat the instruction in different language. *Hamilton v. Hanneman*, 20 Ind. App. 16; *Siberry v. State*, 149 Ind. 684; *Dale v. Jones*, 15 Ind. App. 420; *Eureka, etc., Co. v. Bridgewater*, 13 Ind. App. 333.

A studied consideration of the whole record leads us to the conclusion that the case was fairly tried upon its merits, and a just conclusion reached; and appellant has failed to call our attention to any error for which a mandate of reversal should be entered.

Judgment affirmed.

COLUMBIAN RELIEF FUND ASSOCIATION v. GROSS.

[No. 3,110. Filed April 24, 1900. Rehearing denied June 26, 1900.]

BENEFICIAL ASSOCIATIONS.—Rights of Member to Benefits.—A member of a beneficial association who, during the time for which he claimed indemnity, was, on account of sickness, wholly disabled and prevented from prosecuting any and all kinds of business, does not forfeit his right to indemnity by leaving his room, under the direction of a physician, for the benefit of his health, although such act was in violation of the strict letter of the contract.

From the Floyd Circuit Court. *Affirmed.*

G. B. McIntyre, J. B. James and W. H. Latta, for appellant.

C. L. Jewett and H. E. Jewett, for appellee.

ROBINSON, J.—Appellee sued upon a policy issued by appellant insuring against loss of time by sickness. There was a special finding of facts and conclusions of law in appellee's favor, to which appellant excepted. The complaint is not questioned.

The policy contains, among others, this provision: "If, at any time after this certificate has been in continuous force and effect for ninety days, said member shall, through sickness or disease that originates after the expiration of the above term, become totally disabled and such sickness or disease shall, independent of all other causes, wholly and continuously disable and prevent said member from prosecuting any and all kinds of business, upon satisfactory proofs to the association of such total and continuous disability, the member shall be entitled to and receive ten dollars per week during the time by reason thereof the member is continuously confined to the house and under a physician's care, after the first week, not to exceed thirty weeks for any one illness."

A clause in one part of the application, which by its terms is made part of the policy, reads: "That I made the foregoing answers in person and that I shall only be entitled to benefits for sickness originating after ninety days' membership and then only for the number of consecutive days (in excess of one week) that I am confined to the house and under a physician's care." Another clause in another part of the application reads: "That I can not claim indemnity for sickness or accidental injuries that do not render me totally unable to perform any or all duties of my occupation."

The evidence is undisputed and the findings show that appellee, during the time for which he claimed indemnity, was, on account of sickness, wholly disabled and prevented from prosecuting any and all kinds of business and was under the care of a physician. But it is argued that he was not confined to his house during that time, within the meaning of the policy.

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The findings, which are supported by evidence, show that when appellee became sick he employed Dr. McIntyre; that within a week Mr. Fuller, appellant's agent, requested appellee to discharge Dr. McIntyre and employ Dr. Levi, which appellee did; that about thirty days thereafter Mr. Fuller requested appellee to discharge Dr. Levi and employ Dr. Starr, which appellee did; that the three physicians were each and all skilful and competent; that while appellee was under Dr. Levi's care, Dr. Starr, at appellant's direction, made an examination of appellee as to the character of his sickness; that while under Dr. Starr's care, Dr. Levi, at appellant's direction, made a like examination; that during the latter part of the time appellee was under Dr. Levi's care, upon the direction and request of Dr. Levi, he called at the physician's office to receive medical treatment; that while under Dr. Starr's care, he called at the physician's office for treatment at the direction and request of the physician; and under the direction and advice of Dr. Starr appellee occasionally took exercise in his yard and on the pavement about and near his residence; that appellee was not out of his house within the time in question except when so directed or requested by his physicians and at such times he was in the open air from twenty minutes to half an hour, and was during all such times continuously under the care of the physicians, and following out their instructions and advice in and about curing himself of his sickness.

It is well settled that an application for insurance and the policy issued must be construed together as one contract. From the separate clauses set out in the application an applicant would not be limited in his rights to benefits, as he is under the clause set out in the policy. But construing the scattered restrictions and limitations in the application together, and in connection with the policy itself, the strict letter of the contract probably provides that benefits are to be paid only for the time the beneficiary is totally disabled from sickness, continuously confined to his house and under a physician's care.

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But we can not agree with counsel that the acts of appellee, as shown by the findings, in going out of his house under the directions and advice of skilful and competent physicians for the purpose named, was a violation of the conditions upon which he was to receive indemnity. Conceding such acts to be a violation of the strict letter of the contract, they were not a violation of the spirit and true intent and purpose of the contract. The very acts of which appellant complains were done for the purpose of restoring the member's health and thus ending his right to benefits. The policy itself requires that in order to receive benefits the beneficiary must be under a physician's care. Appellant would no doubt earnestly complain if a member continued sick through refusal to follow the physician's instructions. And it now complains because the member, in trying to regain his health, followed out the instructions of a physician which the policy compels him to call before he can claim any benefits. It would be unreasonable to compel a member to place himself under a physician's care, and then deny him benefits for submitting himself to that physician's treatment. Appellant could not be heard to complain had appellee followed the advice of a skilful and competent physician selected by himself, and especially will appellant not be heard to complain when the physicians are of its own choosing.

Judgment affirmed.

HILDEBRAND, TRUSTEE, v. SATTLEY MANUFACTURING COMPANY.

[No. 3,112. Filed June 6, 1900. Rehearing denied June 26, 1900.]

APPEAL AND ERROR.—Parties.—Notice.—The word co-parties, as used in §647 Burns 1894 providing that a part of several co-parties may appeal and must serve notice of the appeal upon all the other co-parties, means parties to the judgment appealed from, and not co-plaintiffs or codefendants. pp. 220, 221.

SAME.—Joint Exceptions.—Where an exception is made jointly to the conclusions of law, and any one of the conclusions is right the exception must fail. p. 221.

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From the Marion Circuit Court. *Affirmed.*

U. J. Hammond and E. St. G. Rogers, for appellant.

F. E. Gavin, T. P. Davis, J. L. Gavin and C. E. Barrett, for appellee.

ROBINSON, J.—The special finding shows these facts: On January 7, 1896, under a written contract that day made, the firm of Beals & Orr ordered of appellee certain goods, the firm agreeing “to hold all goods and the proceeds of all sales of goods received under this contract, whether the proceeds are in notes, cash or book accounts, as collateral security in trust and for the benefit of, and subject to, the order of the Sattley Manufacturing Company, until we have paid in full in cash all our obligations due the said Sattley Manufacturing Company”; that pursuant to the contract appellee delivered to the firm certain goods; that afterwards, September 14, 1896, the firm executed and delivered to appellant, as trustee, a mortgage which was duly recorded, and that the firm put appellant in possession of all the property mentioned in the mortgage; that appellant obtained the mortgage and possession of the property for the purpose of the trust expressed in the mortgage without any notice or knowledge on his part of the contract between appellee and the firm of Beals & Orr, and to secure indebtedness theretofore incurred by the firm in purchase of goods from creditors therein named in the ordinary course of business; that among the property covered by the mortgage and which passed into the possession of appellant was an account against George Anthony upon the books of the firm for \$122.97, which has not been paid, and that the consideration for this amount was merchandise which appellee had delivered to the firm and which the firm had received pursuant to the written contract, and which the firm had afterwards sold and delivered to Anthony; that among the property mortgaged and which passed to appellant thereunder were other amounts on the firm’s books aggregating \$188 and the consideration for which was merchandise, which

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appellee had delivered to the firm under the written contract and which the firm had afterwards sold, and after the execution and delivery of the mortgage appellant collected the \$188, part before and part after this suit was begun and after appellant had notice of the existence of the written contract; that under the written contract appellee delivered to the firm goods amounting in principal and interest to \$747.45; that deducting the \$188 and \$122.97 there is yet owing appellee from the firm \$436.48.

As conclusions of law the court found that under the written contract between appellee and the firm of Beals & Orr the legal title to and ownership of all goods delivered by appellee to the firm as also the title to and ownership of the proceeds of sale thereof were reserved to and remained in appellee; that appellant has in collecting the \$188 collected so much money rightfully the money of appellee; that Anthony is rightfully indebted to appellee in the sum of \$122.97 and not to appellant; and that the firm of Beals & Orr owe appellee \$436.48.

Judgment was entered that appellee recover from George Anthony \$122.97 and after accrued costs; that appellee recover from appellant \$188 and costs; and that appellee recover from Nathan Beals and William A. Orr \$436.48 with costs.

Appellee moved to dismiss the appeal on the ground that Nathan Beals, William A. Orr and George Anthony are co-parties of appellant in the judgment from which this appeal is prosecuted, that no notice has been served on them nor have they joined in or been made parties to this appeal.

The consideration of this motion was postponed until final hearing. Afterwards, the Supreme Court, where the appeal was then pending, sustained a motion to transfer the cause to this court.

This is not a term time appeal. The statute provides that a part of several co-parties may appeal and must serve notice of the appeal upon all the other co-parties. §647 Burns 1894. The word co-parties as used in this section

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means parties to the judgment appealed from, and not co-plaintiffs or codefendants. *Hadley v. Hill*, 73 Ind. 442.

In the case at bar the judgment is several and not joint. There are no co-parties to the judgment appealed from. The matter determined by this appeal can not be the subject of controversy between appellant and the other defendants. Appellant's codefendants can not be affected by the payment or cancelation of the judgment appealed from. Whether appellant succeeds or fails in this appeal, the several judgments against the other defendants will stand. The reason underlying the rule that co-parties not joining in an appeal must have notice of the appeal, is, that the court may have jurisdiction of all parties interested in the subject-matter of the appeal and settle in one appeal all the rights of such parties as have an interest in the subject of the controversy. But when a party appeals from a several judgment rendered against him alone, no co-party has any interest in the subject-matter of the appeal and the reason for the above rule fails. Elliott's App. Proc. §§138, 139, 141; *Larsh v. Test*, 48 Ind. 130.

Appellant excepted to the conclusions of law as follows: "To which conclusions of law the defendant, Philip M. Hildebrand, trustee, now here, at the time excepts". This alone is assigned as error.

This exception is to the conclusions of law jointly, and if any one of them is right the exception must fail. *Royse v. Bourne*, 149 Ind. 187; *Evansville, etc., R. Co. v. Town of Ft. Branch*, 149 Ind. 276; *Kline v. Board, etc.*, 152 Ind. 321; *Heaston v. Board, etc.*, 153 Ind. 439.

The conclusion of law that Beals & Orr owed appellee a certain sum was right. If the title to the goods when sold to the firm under the contract remained in appellee, it could not both claim title to the goods and sue the firm for the price so long as the goods remained in the possession of the firm, but when the firm converted the goods by selling them and parting with the possession, appellee could sue for their

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value. And if the title passed to the firm when it bought the goods under the contract, and they had not been paid for, appellee might sue for the price. So that, in either event, upon the findings, the conclusion of law that a certain sum was due appellee from the firm was right.

As appellant excepted jointly to all the conclusions, and some of them are right, the judgment must be affirmed upon the authorities above cited.

Judgment affirmed.

JESSEN ET AL. v. PIERCE ET AL.

[No. 8,172. Filed June 27, 1900.]

MUNICIPAL CORPORATIONS.—Street Improvements.—Bonds.—Foreclosure.—Where a property owner pays an instalment of a street improvement assessment which has been made and placed upon the tax duplicate under §4290 *et seq.* Burns 1894, the treasurer's receipt discharges the lien of the assessment to the extent of the payment, and the holder of a bond issued on account of such improvement cannot maintain an action to foreclose the lien of the assessment because of the failure of the treasurer to pay such instalment to the owner of the bond.

From the Newton Circuit Court. *Affirmed.*

W. Cummings and *W. Darroch*, for appellants.

J. T. Saunderson and *T. B. Cunningham*, for appellees.

BLACK, J.—The board of trustees of the town of Brook, in Newton county, caused the improvement under contract of a certain street in the town. The appellees, owners of adjoining lots, executed the written agreement necessary in such case to entitle them to pay their several assessments in ten annual instalments.

The board of trustees, in payment for the improvement, issued to the contractors, the appellants, a street improvement bond, with coupons payable at a specified bank in said town, the first coupon due the first Monday in May, being May 2, 1898, and the second the first Monday in November,

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being November 7, 1898, and ordered that the deferred payments of those entitled to pay their assessments in instalments be placed upon the tax duplicate and be collected in the same manner as other town taxes are collected; and in January, 1898, the board of trustees caused the county auditor to place the assessments against the lots of the appellees upon a tax duplicate and to deliver the duplicate to the county treasurer, showing the instalments and interest payable on the first Monday of May, 1898, and the interest payable on the first Monday of November, 1898.

The appellants, on the 8th of October, 1898, the first coupon being unpaid and still held by them, brought suit against the appellee Pierce, and on the 20th of December, 1898, the first and second coupons being unpaid and held by the appellants, they brought another suit against the other appellees, in each suit seeking to foreclose the liens of the several assessments. These suits were consolidated for trial.

The instalments of the several assessments upon the tax duplicate payable on or before the first Monday of May were paid at that date to the county treasurer by all the appellees except the appellee Pierce, who paid that instalment with ten per cent. thereof added thereto to the county treasurer on the 17th of September, 1898; and prior to the first Monday of November, 1898, the instalments payable on or before that date by the appellees were paid by them respectively to said treasurer. The amounts so paid to the county treasurer remain in his hands; and the only matter for decision is the question whether, notwithstanding the payments to the county treasurer of the instalments upon the tax duplicate as above stated, the appellants, still holding the unpaid coupons, were entitled to foreclose the liens of the assessments.

It is proper to recite some of the statutory provisions relating to street improvements in cities and towns.

It is provided by §4290 Burns 1894, §6773 Horner

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1897, that the cost of the street improvement shall be estimated according to the whole length of the part of the street to be improved per running foot, and the city or the incorporated town shall be liable to the contractor for the contract price of the improvement, and the city or incorporated town shall have a lien upon such lots or parts of lots from the time the improvement is ordered for such costs of improvement, collectible as by the statute provided; and that the assessments with interest accruing thereon shall be a lien upon the property assessed; and "shall remain a lien until fully paid;" and if the city or incorporated town shall fail, neglect, or refuse promptly to enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates thereafter mentioned may foreclose such lien or liens, and shall recover, in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee.

In §4297 Burns 1894, §6779 Horner 1897, it is provided that it shall be lawful for the city or incorporated town to provide by ordinance for the issuance of certificates or bonds to contractors, who, under contract with the city, shall have constructed any such improvement, in payment therefor; and that such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of the city or town to, in, and with respect to every such assessment and the lien thereby created against the property of such owners assessed as shall avail themselves of the provisions of the statute to have their assessments paid in instalments, and shall authorize such contractor or his assigns to receive, sue for, and collect, or have collected, every such assessment embraced in any such certificate or bond, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this statute. "And if the city or town shall fail, neglect, or refuse to pay said certificates or bonds, or promptly to collect any such assessments when due, the owner of any

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such certificates or bonds may proceed in his own name to collect such assessments and foreclose the lien thereof in any court of competent jurisdiction." Any number of holders of such certificates or bonds for any single improvement may join as plaintiffs, and any number of owners of the property on which the same are a lien may be joined as defendants in such suit.

The appellants in their suit to foreclose the lien of the assessments rely upon the above provision, that if the city or town shall fail, neglect, or refuse to pay the certificates or bonds, or promptly to collect any assessment when due, such a suit will lie.

It is provided in §4294 Burns 1894, §6777 Horner 1897, that when bonds have been requested as therein indicated, the common council of the city, or the board of trustees of the town, shall cause the assessment and bonds to be placed upon the city or town tax duplicate and charged against the several lots, etc., ten per cent. for each successive year for ten years, adding to the several amounts interest payable semiannually; and the first ten per cent. shall be due and payable when the first tax falls due and is payable after the assessment is made; and the assessment, as made, together with the interest thereon, shall be a lien upon the several lots, etc., to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or board of trustees, by ordinance, shall prescribe; and the law governing the collection of taxes shall so far as applicable regulate and govern the collection of such assessment, and such assessment and the proceeds arising therefrom shall constitute a special fund for the payment of the costs of the improvement and the bonds and certificates issued therefor, and for no other purpose.

And in §4294 Burns 1894, §6777 Horner 1897, there is also a provision that whenever any payment shall be made

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upon any of such assessments, it shall be the duty of the treasurer, contractor, or owner of the assessments, bonds or certificates or instalments of assessments, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment.

In construing any particular provision of the statute, it must be considered in connection with all other pertinent provisions of the same enactment, and the language of the particular provision should be applied, if possible, so as to allow effect to the apparent meaning of other particular provisions and so as to accord with the intention reasonably inferred from the statute considered as a consistent whole.

The statute made it obligatory upon the appellees to pay the instalments upon the tax duplicate to the treasurer, which they did. By the express provision of the statute, the treasurer's receipt of the money discharged the lien of the assessment to the extent of the payment.

Whatever meaning may be ascribed properly to the provision on which the appellants rely, it can not be allowed the effect of authorizing collection by suit from the lot owner who has paid the accrued instalments in compliance with the positive requirements of the statute, or as giving the remedy of foreclosure of a lien which has been discharged to the extent to which the claim thereby secured has matured.

The money received by the treasurer from the appellees became a part of a special fund devoted exclusively to the payment of the costs of the street improvement and the bond held by the appellants, and to that fund they must resort.

Judgment affirmed.

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THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. PRUITT.

[No. 3,007, Filed June 28, 1900.]

MASTER AND SERVANT.—Railroads.—Negligence.—Instructions.—An instruction in an action against a railroad company for personal injuries to a brakeman caused by the alleged negligence of defendant in maintaining a defective hand-hold on the side of a car which gave way when in proper use by plaintiff, wholly ignoring plaintiff's knowledge of the defect or danger, and authorizing a verdict for plaintiff even though the plaintiff had knowledge of the defect and danger, or could have had such knowledge by the exercise of ordinary care, was erroneous. *p. 230.*

RAILROADS.—Rules Governing Brakemen.—Compliance With Rules Required.—A rule promulgated by a railroad company requiring that brakemen "examine and know for themselves that hand-holds and other parts and mechanical appliances which they are to use are in proper condition; and, if not, to put them so, or report them to the proper parties, and have them put in order before using," is a reasonable rule, and a brakeman who is furnished and is acquainted with such rule has no right to presume without examination that the railroad company has done its duty in properly maintaining such appliances. *pp. 229, 230, 232.*

SAME.—Rules Governing Brakemen.—Instruction.—Burden of Proof.—Where a brakeman was required by the rules of the company to examine and know for himself that all ladders, hand-holds and appliances which he was to use were in proper condition, and if not to put them so, it was erroneous, in an action by such brakeman for personal injuries caused by the giving way of a hand-hold, to instruct the jury that unless it was shown that the plaintiff had been given sufficient time to make the inspection, and provided with necessary tools therefor, he would not be bound by the rule, since by such instruction the plaintiff would be relieved of the burden the law places upon him to show his own want of knowledge of the defects. *pp. 233, 234.*

From the Vigo Superior Court. *Reversed.*

J. G. McNutt, F. A. McNutt and D. Strouse, for appellant.

J. O. Piety and G. M. Crane, for appellee.

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COMSTOCK, J.—Appellee brought this action against appellant to recover damages for personal injuries alleged to have been received by him while in appellant's employ. The complaint is in one paragraph, a demurrer to which for want of facts was overruled, and the cause put at issue by general denial. A trial by jury resulted in a verdict in favor of appellee for \$2,000. Appellant's motion for a new trial was overruled and judgment rendered for the amount of the verdict.

The only specification of the assignment of errors discussed is the action of the court in overruling appellant's motion for a new trial.

It is alleged, in substance, in the complaint, that on the 3rd day of January, 1896, defendant was the owner and operator of a line of railroad leading in and through the city of Terre Haute; that plaintiff was in its employ as a brakeman, whose duty it was, among other things, to couple and uncouple cars and give signals for the starting of the defendant's trains. That on said day plaintiff was one of a crew of men in charge of a certain train of defendant, consisting of a number of freight cars and locomotive, which train was about to depart from defendant's yards about Fourteenth street, in the city of Terre Haute, for points west; that just before said train departed, it was standing across said Fourteenth street; at said point, said train was cut in two portions in order to permit travelers on and along said Fourteenth street to cross defendant's road and right of way; that immediately before said train's departure, this plaintiff, in the discharge of his duties as brakeman, coupled the said portions of said train at said point; that immediately thereafter, at 5 o'clock a. m. on said 3rd day of January, 1896, while it was very dark, said train was started toward the west, and that then and there plaintiff stepped to the rear right-hand corner of one of the cars in said train, and was in the act of getting on said car and on top thereof; that on the right side of and near the rear

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end thereof, a few feet above the bottom of said car, was a hand-hold two feet in length and extending lengthwise of said car, except the rear end being several inches higher than the front end thereof; that underneath the right-hand rear corner of said car was a foot-step; that on the rear end of said car and near the right-hand corner was a ladder reaching to the top of said car, all of which appliances were placed on said car for the purpose of enabling employes to get on and off the said car in the discharge of their duties, and the said ladder was so placed that it was necessary to use the said hand-hold and foot-step in mounting it. That plaintiff in order to get on said car placed his foot on said foot-step underneath the said corner of said car, and with his right hand took hold of the said hand-hold; that said hand-hold, at the end next to the rear end of said car, came loose, causing the plaintiff to fall down between said car and the one next following thereto on the track; that plaintiff's left hand was caught underneath the wheels of the last named car, and was mangled, bruised, lacerated, and crushed; that plaintiff received the injuries hereinbefore mentioned without any fault on his part, but wholly by the fault of the defendant, in this, to wit: That defendant carelessly and negligently permitted the said hand-hold to become loose, insecure, and unsafe, all of which was unknown by this plaintiff, and which was known to this defendant and could have been known by defendant by the exercise of reasonable care and diligence and inspection.

At the time of the accident appellee was forty years old, had been engaged in the business of railroading fourteen years, and employed as brakeman by the defendant about one year. The manner of the accident was proved substantially as alleged.

Appellee was furnished a book containing rules for brakemen. One of the rules, with which appellee was acquainted, contained the following: "They must examine and know for themselves that the brake-shafts and attachments, lad-

ders, running-boards, steps, hand-holds and other parts and mechanical appliances which they are to use are in proper condition; and, if not, put them so, or report them to the proper parties and have them put in order before using."

Counsel for appellant discuss the action of the court in giving to the jury instruction numbered two requested by appellee, modified by the court, and given as modified. This is made the seventh reason for a new trial. The instruction is as follows: "The court instructs you that defendant was in duty bound to exercise reasonable care in furnishing plaintiff reasonably safe appliances and machinery with which plaintiff might perform the work within the scope of his employment as that of brakeman; and plaintiff, under the law, had a right to presume that defendant had performed its duty in this respect; and if you should find that the defendant failed and neglected to perform such duty, and you should further find that by reason of such failure plaintiff was injured, and without any fault on his part, if you should so find from a preponderance of the evidence, then you should find for the plaintiff."

The objection urged to this instruction is that it omits the essential fact that plaintiff must be ignorant of the defect. It is claimed that freedom from fault and ignorance of the defect are distinct elements in cases of this kind. In the recent case of *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, this question is directly decided. In passing upon the correctness of an instruction given to the jury in the case last named, the court, by Monks, J., said: "It was alleged in the complaint that appellant had full knowledge of the defects mentioned in said instruction, and that the decedent had no knowledge thereof. Under the allegations of the complaint appellee was required to prove not only that the decedent had no knowledge of said defects, but that he could not have known them by the exercise of ordinary care. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, and cases cited; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531.

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It will be observed that said instruction wholly ignores the decedent's knowledge of the defects mentioned in said instruction, and directs a verdict in favor of appellee, even though the decedent may have had full knowledge of said defects or dangers, or could have had such knowledge by the exercise of ordinary care. If he had knowledge of said defects and dangers, or could have had such knowledge by the exercise of ordinary care, then he assumed the risks resulting therefrom, if thereafter he voluntarily continued in the service. *Consolidated Stone Co. v. Summit, supra*, *Pennsylvania Co. v. Ebaugh, supra*, and cases cited; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, and cases cited; *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566. See, also, *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *Quinn v. Chicago, etc., R. Co.*, 107 Iowa 710, 77 N. W. 464; 12 Am. & Eng. R. Cas. (N. S.) 512. In *Pennsylvania Co. v. Ebaugh, supra*, the trial court gave the jury an instruction which contained the element of actual knowledge on the part of the injured employe, but omitted any reference to his constructive knowledge, and this court said: 'The objection urged against instruction nineteen is that it limited the plaintiff's assumption of risk to the defects in the road-bed of which he had actual knowledge. It is a rule of universal acceptance by the courts of this country that an employe assumes all the ordinary dangers of his employment which are known to him, or which by the exercise of ordinary diligence would have been known to him.' As the said instruction twelve directed the jury in plain terms to find for the plaintiff if the facts therein stated were proved, without regard to the actual or constructive knowledge of decedent, it was clearly erroneous." In addition to the authorities named in the foregoing opinion, we cite: *Kentucky, etc., Co. v. Eastman*, 7 Ind. App. 514; *Voris v. Shotts*, 20 Ind. App. 220; *New Kentucky, etc., Co. v. Albani*, 12 Ind. App. 497; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583.

In *New Kentucky, etc., Co. v. Albani, supra*, Gavin, J., speaking for the court, said: "But in suits by the servant against the master for his negligent failure to furnish a safe place or safe machinery or appliances for the servant's task, the law must now be regarded as settled in Indiana by repeated adjudications, that knowledge is an independent element of liability not included in the general averment of negligence or want of negligence." Under the authorities, the instruction must be held to be erroneous. Nor could this error have been corrected by other instructions given by the court, as claimed by counsel for appellee. The correction of such an error can only be made by the withdrawal of the erroneous instruction. This was not done. *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584; *Pittsburgh, etc., R. Co. v. Noftsgar*, 148 Ind. 101; *Wenning v. Temple*, 144 Ind. 189; *Clem v. State*, 31 Ind. 480; *McCole v. Lochr*, 79 Ind. 430; *Lower v. Franks*, 115 Ind. 334; *McCrory v. Anderson*, 103 Ind. 12; *Uhl v. Bingaman*, 78 Ind. 365. The lengthy quotation from *Chicago, etc., R. Co. v. Glover, supra*, and the additional authorities cited, make it unnecessary to say more upon this objection.

The portion italicized of the following part of this instruction is also objected to: "The court instructs you that defendant was in duty bound to exercise reasonable care in furnishing plaintiff reasonably safe appliances and machinery with which plaintiff might perform the work within the scope of his employment as that of brakeman; and plaintiff under the law had the right to presume that defendant had performed its duty in this respect," etc. It is claimed that the court thus told the jury, in effect, that the plaintiff had the right to act upon the assumption that the defendant had done its duty, and that he was therefore excused from making any inspection for himself. Under the rule hereinbefore set out, it was the duty of appellee himself to examine the hand-holds. An employer may adopt reasonable rules for the conduct of his business. When brought to the knowledge

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of the employe, they constitute an element of the contract of hiring. Where these rules are disregarded by an employe, there can be no recovery by the employe unless he shows that obedience would have augmented the danger, or that it would have been impracticable. *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212.

In *Ft. Wayne, etc., R. Co. v. Gruff*, 132 Ind. 13, the Supreme Court seem to hold that the rule in question is a reasonable one. While ordinarily an employe has the right to assume that his employer has done his duty, as stated in the instruction, in view of the rule referred to, the instruction was erroneous in excusing plaintiff from its observance.

The giving of instruction numbered one, requested by appellee and given as modified by the court, is made the fifth reason for a new trial. The objection made to instruction numbered two, *supra*, viz., that it did not contain the statement of the want of knowledge of the defect on the part of plaintiff, applies to instruction numbered one. The same authorities are applicable to both. The same objection is made to instruction numbered three given to the jury; that is, that no mention is made that it is necessary for plaintiff to show that he did not know of the defect.

The giving of instruction number seven is made the fourteenth reason for a new trial. It is as follows: "The rule requiring brakemen to examine and know for themselves that the brake-shafts, and attachments, and ladders, and running-boards, steps, hand-holds, and other parts and mechanical appliances which they are to use, are in proper condition, cannot reasonably be applied at all times and under all circumstances; and I instruct you that, unless it is shown that the plaintiff was given sufficient time fully to examine and know for himself that the various parts of the train with which he had to work were in safe and good condition and that he was provided with such tools and instruments necessary for making a proper inspection to

inform himself as to the condition of these appliances, he would not be bound by the rule." Objection is made to the part of the instruction which states, "unless it is shown that the plaintiff was given sufficient time fully to examine and know for himself that the various parts of the train with which he had to work were in safe and good condition," etc. The objection is based upon the proposition that the burden was upon the plaintiff to show that he had neither actual nor imputed knowledge of the defective hand-hold; that this burden was never shifted. This position is well founded. The burden of a particular issue never shifts. *Fay v. Burditt*, 81 Ind. 433; *Carver v. Carver*, 97 Ind. 497; *Holt Ice Co. v. Arthur Jordan Co.*, *post*, 314.

It is claimed, and we think fairly, that the manifest inference to be drawn from the expression "unless it is shown," etc., is that sufficient time should be shown by the defendant. Counsel for appellee, conceding for the sake of the argument that by this instruction the burden of proof was wrongfully put upon the defendant, claim that it was harmless, for the reason that the evidence conclusively shows that the plaintiff did not have sufficient time to make the inspection. Counsel for appellant claim that the evidence shows that appellee made no pretense of complying with the rule requiring him to make personal inspection. The evidence is of such a character that the question of the knowledge, actual or constructive, of the appellee of the defective hand-hold and his observance of the rule in question, should have been submitted to the jury upon instructions free from uncertainty as to the burden of proof.

As before stated, it is claimed in this case, as it was claimed in *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, that the error, if any, in the instructions discussed was cured by others given correctly stating the law. This argument is met in the case last named and the authorities therein cited. The insufficiency of the evidence to sustain the verdict is discussed earnestly and at length. The con-

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clusion already reached renders it unnecessary to determine this question.

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

FRUITS v. PEARSON.

[No. 3,093. Filed April 19, 1900. Rehearing denied June 28, 1900.]

VENDOR AND PURCHASER.—Contracts.—Rescission.—Recovery of Purchase Money.—An action can be maintained by a vendee to recover payments made by him on a contract of purchase, where it is shown that there was a rescission of the contract by the mutual consent of the parties.

From the Fountain Circuit Court. *Reversed.*

G. W. Paul and *J. B. Martin*, for appellant.

O. P. Lewis and *J. A. Lindley*, for appellee.

COMSTOCK, J.—The complaint in this cause avers, in substance, that on the 29th day of September, 1897, the defendant, appellee here, was the owner and in possession of a livery stock, and that the plaintiff was the owner of two lots in the town of Veedersburgh, Indiana, on which there was a mortgage amounting to \$400; and that on said day the plaintiff and the defendant entered into an oral agreement for the sale and purchase of said stock, to wit: The said Fruits agreed to convey said real estate to Pearson clear of encumbrances, except the said mortgage, the amount of which he agreed to reduce to \$296, and pay to said Pearson the sum of \$250 in money. In consideration thereof, Pearson agreed to sell to said Fruits said livery stock and deliver to him the immediate possession of the same, but he would retain the title thereof until the said mortgage was reduced to the sum of \$296, upon which event the title was to vest in the plaintiff; said Pearson agreed to give the plaintiff two months from September 29, 1897, in which to perform said stipulation; at the end of the two months, plaintiff failed to perform said stipulation, except

the payment of \$20, and he requested and was granted an extension of ten days in which to perform the same; that on the said 29th day of September, plaintiff executed to the defendant a deed conveying said lots and put defendant in possession of the same. The rental value of said lots was and is \$8 per month, and the defendant has collected and received the rents since said date, amounting to near \$130. Plaintiff paid the defendant in cash and in notes, on which plaintiff received the money afterwards, the said \$250 within the sixty days; which said money and notes were delivered by the plaintiff to the defendant as part of the purchase money of said livery stock in addition to the conveyance of said two lots in Veedersburgh, which lots were rated and taken by defendant on the purchase price of said stock and \$250 subject to said \$296 of mortgaged indebtedness, a total of \$500 thus paid by plaintiff to defendant for said livery stock. That defendant retains all of said money and said lots; that, upon the expiration of the time within which plaintiff was to make said payment, the plaintiff failed to reduce said mortgage to \$296 as agreed, and thereupon the defendant, with the consent of the plaintiff, under said agreement took possession of all said livery stock as his own, and has sold part or all of the same, and treated said property as his own, and has had the use of said livery stock since about the 1st of December, 1897; that said contract of sale was wholly rescinded and abrogated by mutual consent and acts of the plaintiff and defendant; that the value of the use of said livery stock while in the possession of plaintiff was \$30 per month; that the amount due on said mortgage, in excess of said \$250, at the time defendant took possession of the livery stock was \$92.10, and, deducting said amount from said \$250, the contract price of said lots, leaves a balance of \$157 on the purchase price of said lots, and deducting from the \$250 cash and notes aforesaid \$70 for the use of said livery stock while in the possession of the plaintiff, there remains of said \$250 the sum of \$185 of said

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money in the hands of the defendant. Wherefore he demands judgment, etc.

The court sustained a demurrer for want of sufficient facts, and the plaintiff refusing to plead further, judgment was rendered in favor of the appellee for costs. This ruling of the court is the only error assigned.

The purpose of the complaint is to recover the payment or payments made in the part performance of the contract. Appellee insists that upon the failure of the vendee to perform the conditions of the contract, all instalments paid were forfeited, and can not be recovered. This view was manifestly adopted by the trial court.

From Beach on the Modern Law of Contracts, counsel quote the following part of section 139: "In the absence of a statute provision to the contrary, a buyer loses absolutely all instalments paid when the sale is rescinded on account of his default." And cites numerous decisions in support of the proposition for which they contend. To this general statement of the law we take no exception. It is not, however, applicable to facts stated in the complaint.

In *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520, the court say: "No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." Quoting the foregoing extract from the case named, our Supreme Court, in *Dantzeiser v. Cook*, 40 Ind. 65, at p. 69, say: "This is little more than a statement that one party can not alone rescind the contract without the fault of the other party or his concurrence in the rescission, and recover back what he has paid upon it; and we concur in the doctrine. But in the case before us, though the defendant at one time may have been ready to proceed and

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fulfil the contract on his part, yet he afterward disabled himself to do so by conveying the property to another. He by his conduct consented to a rescission of the contract. The rescission leaves the parties as if the contract had never existed."

The complaint before us avers that the possession of the property contracted to be sold was retaken by appellee, and that the contract was by the acts of the parties and by their mutual consent abrogated and rescinded.

In *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266, the contract for the sale of land provided that if default should be made in fulfilling any part of the contract on the part of the purchaser, the seller might regard the contract as forfeited and resell the land. In the course of the opinion the court said: "It is thoroughly settled in Indiana that, where one party to an entire special contract has not complied with its terms, but, professing to act under it, has done for, or delivered to, the other party something of value to him, which he has accepted, the party who has been thus benefited by the labor or property of another, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him."

Gillet v. Maynard, 5 Johns. 86, was an action for money had and received, to recover back money paid in a parol contract for the purchase of land, which contract had never been fully executed. The court said: "If the contract be considered as rescinded, no doubt can be entertained but that the plaintiff is entitled to recover back the money paid by the intestate."

Gwynne v. Ramsey, 92 Ind. 414, was a suit to recover certain moneys which appellee alleged he had paid appellant upon a contract for the purchase of certain real estate, which contract he claimed had been rescinded. We quote from the opinion: "Doubtless, it is true as a general proposition, that a contract can only be rescinded by the common consent of all the parties thereto. * * * We know

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of no reason why the mutual consent of the parties to the rescission of the contract may not be shown by their acts, as conclusively and satisfactorily as by evidence tending to prove an express rescission. When the rescission is shown, * * * an action will lie to recover whatever may have been paid or delivered, or the value thereof on account of such rescinded contract," citing *Dantzeiser v. Cook*, 40 Ind. 65. See, also, *Harris v. Bradley*, 9 Ind. 166.

The foregoing decisions are based upon the proposition that it is inequitable to permit the vendor of property to retain the property and the purchase money after the contract of sale has been rescinded.

The averments of the complaint before us show a rescission of the contract in suit by the mutual consent of the parties thereto. It therefore states a cause of action.

Judgment reversed, with instruction to overrule the demurrer to the complaint.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY v.
HOFF.

[No. 8,849. Filed April 8, 1900. Rehearing denied June 28, 1900.]

CONTRACTS.—*Mistake.*—*Notice.*—*Pleading.*—An action by a landowner against a railroad company for damages on account of the alleged closing of a passageway under defendant's tracks cannot be maintained, where the complaint was based upon a written contract or deed executed by plaintiff's remote grantor to defendant's remote grantor and it is disclosed by the deed that the part of the land upon which the underground passageway was located was omitted from the deed, since the deed was not notice to defendant of its liability to maintain such crossing at any place other than upon the land described, and an allegation that the parties to the deed by mutual mistake omitted to describe the tract upon which the passageway was located has no force unless such mistake was brought to the notice of defendant. pp. 240-242.

ADVERSE POSSESSION.—*Passageway Under Railroad.*—*Pleading.*—A complaint by a landowner against a railroad company for damages on account of the action of defendant in closing up a passageway under its tracks to plaintiff's damage is sufficient against a de-

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murrer, where it is alleged that plaintiff was the owner of the land with uninterrupted adverse use, under claim of right, with notice to defendant of the passageway for more than twenty-one years. pp. 242, 243.

HARMLESS ERROR.—*Overruling Demurrer to Bad Paragraph of Complaint.*—Where the special finding shows that sufficient facts were found therein upon which to render judgment under the averments of a good paragraph of complaint, the judgment will not be reversed because of the action of the court in overruling a demurrer to a bad paragraph. p. 243.

From the Cass Circuit Court. *Affirmed.*

J. B. Cockrum, R. J. Loveland, H. P. Loveland, S. T. McConnell and *A. G. Jenkins*, for appellant.

J. C. Nelson, Q. A. Myers, E. T. Reasoner, J. W. O'Hara, W. C. Bailey and *C. A. Cole*, for appellee.

HENLEY, J.—This cause was transferred to this court by the Supreme Court in which court it was filed on the 1st day of September, 1898. Appellee was the plaintiff below and commenced this action to recover damages on account of the alleged wrongful closing of his passageway under appellant's track. The complaint is in three paragraphs. In the first paragraph of complaint it is averred that appellee is the owner and in possession of the following described real estate in Miami county, in the State of Indiana, viz.: Fractional section number twenty-two, being lots numbered one and two south of Eel river in said section twenty-two in township twenty-eight north of range four east, containing eighty-four and eighty-five one-hundredths acres; also "a strip containing five acres of equal width across the north end of the northwest quarter of section number twenty-seven of the same township and range." Said two tracts lie contiguous and constitute a single farm. On the 12th day of August, 1868, one Isaac Fisher, who then owned said land, granted by deed to the Chicago, Cincinnati & Louisville Railroad Company a right of way through a portion of said land, a copy of which deed is filed with and made a part of the complaint; and said deed was duly recorded in the deed

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records of the said county. That it was the intention of the parties to said deed that it should convey a right of way through all of the real estate hereinbefore described, but the said deed by the mutual mistake and inadvertence of both parties thereto was so drawn as to describe but a portion of said real estate. That by said deed the grantee as a part consideration for the grant therein contained agreed to construct and maintain an underground crossing sufficient for the free passage of teams, loaded wagons, live stock, etc., under appellant's road, which was about to be constructed on said right of way. That in pursuance of said agreement the grantee in said deed did establish on the five acre tract of land last described a crossing of the kind agreed upon in the contract, and for many years maintained said crossing in compliance with said contract. That appellant, a foreign corporation, became the successor of said Chicago, Cincinnati & Louisville Railroad Company by *mesne* conveyances and the owner of the said right of way conveyed by the deed aforesaid. That in October, 1895, said appellant without right and without the consent of appellee destroyed and obstructed said underground passage so that it is insufficient for the purposes for which it was used and intended, by reason of which appellee's land has been damaged in the sum of \$1,500, etc. There is no material difference between the first and second paragraphs of complaint.

In the third paragraph of complaint the ownership of all the land described in the first paragraph of complaint, and the uninterrupted adverse use, under claim of right, with notice to the appellant of this passageway for more than twenty-one years are alleged. That appellee's passage so acquired has been filled up and obstructed so that it is rendered of no use to him, and that his land has been damaged and he has been put to great trouble and expense in rearranging his fences, etc.

A demurrer to each paragraph of complaint was overruled. This ruling is the first alleged error of the lower

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court presented to us for decision. Both the first and second paragraphs of complaint count upon a written contract or deed executed by appellee's remote grantor to appellant's remote grantor. This deed being of record was notice of its contents to all holding thereunder. As is disclosed by both paragraphs of complaint under consideration, and by the deed filed as an exhibit, a part of appellee's land, being the part upon which his underground passageway was located, was omitted from the deed. The deed was not notice to appellant of its liability to maintain such a crossing at any place other than upon the land described therein. The allegation that the parties to the deed by mutual mistake omitted to describe the five-acre tract upon which the passageway was located has no force unless such mistake was brought to the notice of appellant. Under the allegations of appellee's first and second paragraphs of complaint, the rights of the parties to this action must be measured by the deed as it stands, and there could be no liability on the part of appellant for the damages claimed growing out of the change or obstruction of the passageway as described and located in said pleadings. The third paragraph is undoubtedly good as against any objection counsel have pointed out.

It is contended by counsel for appellee that errors in overruling demurrers to pleadings, when there is a special verdict or special findings of fact, are not material, and numerous cases are cited from both courts of appeal in this State to sustain this statement. Nearly all the cases cited justify counsel's statement, but the Supreme Court have, we think, with good reason, established a different rule of law. The recent cases in that court have been to the effect that if an averment essential to the sufficiency of a pleading is omitted therefrom, and the special finding finds said omitted averment, which, if it had been contained in the pleading would have rendered the same sufficient, this will

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not cure the error of the court in overruling a demurrer to such pleading, for the reason that such a finding is outside the issues, and such facts must be disregarded by this court. A special finding, special verdict, or answers to interrogatories may show that the errors of the trial court in its rulings upon demurrers were harmless, but they can in no case supply essential averments omitted from a pleading. *Bird v. St. John's Episcopal Church*, 154 Ind. 138; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153; *Western Assurance Co. v. Koontz*, 17 Ind. App. 54.

In *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, it is said: "When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record." We must then regard the cases cited by appellee to sustain his contention that errors in overruling demurrers to pleadings when there is a special verdict or special findings of fact are not material, as modified, in this particular, to conform with the rule expressed in the later decisions herein cited.

The lower court erred in overruling the demurrers addressed to the first and second paragraphs of complaint.

An examination of the special findings shows that sufficient facts were found therein upon which to render judgment under the averments of the third paragraph of complaint. It thus appears affirmatively from the record that the judgment was founded upon a good paragraph of complaint, and will not be disturbed. The other questions presented by the record are without merit, and a discussion of them would serve no useful purpose. We find no reversible error. Judgment affirmed.

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THE STATE, EX REL. HANNA ET AL., v. HITCHENS ET AL.

[No. 3,024. Filed June 29, 1900.]

CONSTABLE. — *Compensation. — Expenses in Caring for Property Seized.* — A constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in caring for and preserving property seized under a valid process. *p. 247.*

SAME. — *Compensation. — Expenses of Sale.* — The duty of selling goods levied on by a constable devolves upon that officer, for which services he receives as compensation the statutory commission. He is not authorized to tax and collect, as part of his costs, the sums paid to an auctioneer and clerk employed by him to assist in the sale. *pp. 248, 249.*

SAME. — *Failure to Itemize Costs.* — The failure of a constable to itemize in his return of writ the services for which he charged will not, in an action by a judgment creditor to compel such officer to turn over money unlawfully retained as costs, defeat the constable's right to statutory fees to which it clearly appears from the evidence he is entitled. *p. 249.*

From the Cass Circuit Court. *Reversed.*

F. Swigart, J. C. Nelson and Q. A. Myers, for appellants.

D. B. McConnell and E. B. McConnell, for appellees.

COMSTOCK, J. — This action was prosecuted against the appellees George W. Hitchens, constable, and John Mitchell and Andrew Ray, his bondsmen, to recover money collected by Hitchens as principal and retained from appellants. Nine creditors of appellants (relators) obtained judgment before a justice of the peace against them, and caused executions to issue to appellee Hitchens as constable. He levied the executions upon the store of the relators in the city of Logansport, Indiana, and sold a portion of the goods to satisfy the same. The relators claim that the total amount due on the judgments, interest, fees, costs, and accrued costs, at the time they were paid, was \$821.72; that the constable charged and retained the sum of \$1,033.77, being \$203.14 more than he was authorized by the statute of Indiana to

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charge and retain. The cause was put at issue, tried by the court, and judgment rendered for costs in favor of appellees.

The action of the court in overruling appellants' motion for a new trial is the only error assigned. There are four reasons assigned in the motion for a new trial. The first is: "The finding of the court is not sustained by sufficient evidence." The second: "The finding of the court is contrary to law." The record discloses no ruling nor exception thereto upon which to base the third and fourth reasons for a new trial. It remains only, therefore, to consider the first and second reasons for a new trial.

The following is the return made to the writ by appellee Hitchens: "I received this writ on the 1st day of June, at 1:30, 1897, and on the 23rd day of September, by virtue thereof, and also of eight other writs against the same defendants in my hands from the dockets of David Laing and Geo. W. Fender and J. H. Walters, justices of the peace of Cass county, Indiana, I levied all of said writs upon a certain stock of notions, pictures, frames, and toys, etc., belonging to the defendants, situated in a storeroom at 421 Market street, Logansport, Indiana, and I proceeded to have the stock appraised according to law, which was done by Frank M. Polk and Jas. A. Day, and thereafter, to wit, on the 4th day of October, I advertised the said goods for sale as required by law, and when the time of the sale arrived, the said stock having come into litigation by claimants against the property, to wit, a suit by William Douglass in the Cass Circuit Court, I suspended said sale until the issue of that case was determined, and after the same had been determined I again advertised said stock for sale according to law, by posting three written and printed notices in the city of Logansport at public places therein, and one on the door of the building in which said goods were contained, and at the time appointed for the sale I proceeded to sell said stock of goods under said writs at public auction and outcry, beginning on the 6th day of November and con-

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tinuing the same from day to day as required by law until the 2nd day of December, when, having realized the sum of \$1,042.10 upon the sale under said writs, I suspended the sale, leaving a portion of the goods levied upon still unsold, and having sold sufficient of the stock to satisfy said writs against said defendants in my hands and out of the proceeds thereof I paid the judgments of \$118.20 in favor of Gustave Burgman, which with interest, costs, and accruing costs amounts to \$167.15; and also another judgment in favor of Gustave Burgman of \$117.35, which with interest, costs, and accruing costs amounts to \$166.34; and also another judgment in favor of Gustave Burgman of \$117.91, which with interest, costs, and accruing costs amounts to \$166.60; and also another judgment in favor of Gustave Burgman of \$119, which with interest, costs, and accruing costs amounts to \$167.21; and also another judgment in favor of the National Jewelry Company of \$35.46, which with interest, costs, and accruing costs amounts to \$59.54; and also another judgment in favor of James E. Patton & Company of \$22.66, which with interests, costs, and accruing costs amounts to \$46.08; and also another judgment in favor of Daniel P. Rhoads, \$13.33, which with interests, costs, and accruing costs amounts to \$37.35; and also another judgment in favor of Wilson, Humphrey & Company, of \$92.29, which with interest, costs, and accruing costs amounts to \$114.88; and also another judgment in favor of the Toledo Manufacturing Company for \$85.88, which with interest, costs, and accruing costs amounts to \$108.94,—making in all the sum of \$1,033.79; and I have paid the rent and storage room for said goods so levied upon for the period of seventy days, amounting to \$70, and also the appraisers; and the stock of goods being situated in an eligible room in a good locality to realize the largest possible price, and it being necessary to the economical and safe management of the sale to employ an auctioneer, and it being necessary for the purpose to employ a clerk, I have

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paid the services of both as part of the costs herein, and I herewith return this writ satisfied in full, and I further certify that the surplus of goods levied upon under this writ and the proceeds thereon are held at this time under other writs against the defendant Charles M. Hanna. Geo. W. Hitchens, Constable."

It appears from the record that appellee Hitchens retained from the proceeds of the sale of which he made return, in addition to the fees provided by statute, the amount expended by him for rent of storeroom, the amounts paid the auctioneer, clerk, and watchman, the amount paid for lock for door of the store, and the cost of lighting the room by night.

The proposition that an officer can retain for his services only such fees as are allowed by law requires the citation of no authorities. The principal question presented by this appeal is whether he is entitled to the amounts thus retained or is limited to the fees fixed by statute. The act providing for fees for constables went into force March 8, 1897. Acts 1897, pp. 217, 218. This fee bill is intended to provide compensation for personal services which the law imposes upon him. While the decisions are not in harmony, from the weight of authorities, we think the proposition may be deduced that a constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in taking care of and preserving property seized under valid process.

It was said in *Cramer v. Appenstein*, 16 Col. 495, 27 Pac. 713, by the supreme court of Colorado, that "the ordinary fees allowed by statute evidently were not intended to cover all extraordinary disbursements which the sheriff may be compelled to make in the faithful discharge of such duties." The constable's return, which we have set out, shows the date of the levy, of the expenditures, the appraisal of the stock, the advertisement of the sale, the suspension of the sale because of litigation involving the title of

the property, the further advertisement after the determination of said litigation, and the sale of said property from day to day at auction, until the sum of \$1,042.10 was realized therefrom; that he applied of the proceeds of said sale the sum of \$1,033.79 to the payment of the several executions in his hands; that, between the time of the levy of the executions and the conclusion of the sale, he paid rent for the room in which the goods were stored—the same room in which the judgment defendants had done business—and sold, at the rate of \$1 per day for seventy days. The return further shows the employment of an auctioneer and clerk, but does not state the amount paid the appraisers, the auctioneer, the clerk, the watchman, nor the cost of advertisement. As to these items the return is defective. These items, however, for which the constable retained pay from the money realized were testified to by the constable, and were not disputed. It appears from the record that it became necessary to procure a lock for the door of the storeroom; he testified that he employed and paid a watchman to guard the goods for a time, and that he paid for lighting the storeroom while the sale of the goods was in progress at night.

In *Rogers & Co. v. Simmons*, 155 Mass. 259, at p. 261, it is said: "There are strong reasons against allowing an officer to use his discretion in making charges against property beyond those expressly allowed by the statute, and such expenses as are necessarily incurred in the performance of his legal duties. In this state, when the property is of such a kind that it is necessary for the officer to procure and pay for storage for it, he is allowed such sums as are properly so paid, * * *. But for all the officer's personal services, whether ordinary or extraordinary, the fees expressly provided by the statute are intended to be the only compensation."

Neither the necessity for the storage of the goods, the procuring of the lock, nor the reasonableness of the amounts

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paid for the use of the storeroom, or for the lock, or the watchman, are questioned. The sale of the property was a personal service, the duty of performing which the law cast upon the constable, and for which the fee bill allowed him a commission. The law would not authorize him to charge the parties for the additional cost either of an auctioneer or a clerk. The duty of selling the goods devolved upon the officer. An office is accepted with its burdens. In some cases in which the officer is called upon to act the compensation made by statute seems small; in others it is ample.

Counsel for appellant argue that inasmuch as the constable did not itemize in the return of the writ the services for which he charged that he is entitled to no fees. This claim of counsel might be allowed did not the various items for which he retained the money in question fully appear from the evidence before us. The valid may readily be separated from the invalid. The law cast upon the officer the obligation of protecting and taking care of the goods. The storage and the securing of the lock and the watchman were necessary to the discharge of this obligation for which the fee bill made no provision. See *Smith v. Huddleston*, 103 Ala. 223, 15 South. 521.

The finding of the court allowed appellee to retain the amounts paid to him for auctioneer and clerk hire. As to these items, the judgment was contrary to law. Many cases are cited by counsel representing the adversary parties. When applicable to the facts shown by the record before us they are not in conflict with the opinion herein expressed. Constructive fees are not allowed in Indiana, but reasonable and necessary allowances for the care of property held under a valid execution can not properly be considered fees. They are expenditures for the protection of the property payable out of the fund realized from its sale. The watchman was employed and paid to guard the property pending litigation.

The judgment is reversed, and the trial court is directed to sustain appellants' motion for a new trial.

City of Huntington v. Boyd.

CITY OF HUNTINGTON v. BOYD.

[No. 8,114. Filed June 29, 1900.]

PLEADING. — Complaint. — Action Against City by Patrolman for Salary.—In an action against a city for salary due plaintiff as patrolman, the complaint alleged the appointment of plaintiff to the office of patrolman by the board of metropolitan police commissioners of such city “then and there duly appointed, organized, and acting as such under and in pursuance of the laws providing for such board.” *Held*, that there was sufficient averment that the board was legally constituted to withstand a demurrer. *pp.* 250, 251.

APPEAL. — Sustaining Demurrer to Argumentative Denial. — When Harmless Error.—It is not reversible error to sustain a demurrer to a paragraph of answer which is merely an argumentative denial, a general denial having been pleaded. *p.* 251.

SAME. — Bill of Exceptions. — When Not in Record.—A bill of exceptions does not become a part of the record unless it is presented to the trial judge within the time given. *pp.* 251, 252.

From the Huntington Circuit Court. *Affirmed.*

J. F. France and *Z. T. Dungan*, for appellant.

M. L. Spencer and *J. S. Branyan*, for appellee.

ROBINSON, C. J.—Appellee’s complaint avers that on July 1, 1897, he was appointed to the office of patrolman for appellant by the board of metropolitan police commissioners of appellant, “then and there duly appointed, organized, and acting as such under and in pursuance of the laws providing for such board,” at a salary of \$550 per year; that he entered upon such employment and discharged the duties thereof for six months and six days when with the consent of his superiors he retired from the service; that the service was accepted by appellant as rendered, was of the value of the salary fixed, and that such salary to the amount of \$285 is due and unpaid.

The first and second assignments of error question the sufficiency of the complaint. It is argued that there is no averment that the board was a legally constituted one but

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that it is only averred that the board was acting as such. But the averment is that appellee became such officer through appointment by a board then and there duly appointed, organized and acting as such pursuant to the laws providing for such board. The demurrer admits that the board appointing appellee was duly appointed and organized. Much of appellant's argument upon the complaint is directed to a question not presented by a demurrer for want of facts, but could be raised only by answer. If it be the fact that there was no such office to fill, and that therefore appellee was not such officer, this could be raised by answer, and not by demurrer or an assignment of error that the complaint does not state sufficient facts. The demurrer to the complaint was properly overruled. See *Reubelt v. School Town, etc.*, 106 Ind. 478; *School Town, etc., v. Powner*, 126 Ind. 528; Acts 1897, p. 90.

Appellant answered in four paragraphs. The first was the general denial. A demurrer was sustained to the second paragraph, and this ruling is assigned as error. But this paragraph does not confess and avoid the complaint. Its allegations are to the effect that appellee was never appointed an officer of appellant; that he was at no time such officer; that appellant never agreed to pay him for any services, and notified him when he began the services that appellant would not be responsible for his pay and that he never performed such services. This paragraph is no more than a special or argumentative denial of the complaint, and having been pleaded with the general denial, under which the facts pleaded were provable, there was no reversible error in sustaining the demurrer to it. *Henderson v. Henderson*, 110 Ind. 316; *Nixon v. Beard*, 111 Ind. 137; *Mason v. Mason*, 102 Ind. 38.

The remaining error assigned is overruling appellant's motion for a new trial. Whether the questions argued under this assignment can be considered depends upon whether the evidence is properly in the record. Counsel for appellee

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insist that it is not. The motion for a new trial was overruled and judgment rendered October 17th, and sixty days' time given to present a bill of exceptions. The bill containing the evidence was presented to the judge, signed and filed December 17th. As this was not within the time given, the evidence is not in the record. *Rigler v. Rigler*, 120 Ind. 431; *McCoy v. State*, 121 Ind. 160; *City of Plymouth v. Fields*, 125 Ind. 323.

Judgment affirmed.

COX v. ROBERTS.

[No. 8,157. Filed June 29, 1900.]

FRAUDS, STATUTE OF.—*Sheriff's Certificates.—Contracts of Sale.*—A sheriff's certificate of sale of real estate represents an interest in the land, and a contract to sell or transfer such certificate is within the statute of frauds, and, to be enforceable, must be in writing.

From the Whitley Circuit Court. *Reversed.*

A. A. Adams, for appellant.

T. R. Marshall, W. F. McNaghy and P. H. Clugston, for appellee.

HENLEY, J.—It is assigned as error that the lower court erred in overruling the demurrer to the complaint.

The complaint is in one paragraph, and is as follows: "Plaintiff complains of defendant and says that one Margaret Roberts, in her lifetime, was the owner of the following described real estate, in Whitley county, Indiana, to wit: the southwest quarter of the northeast quarter of section eighteen, in township thirty-one north, range nine east; that said real estate was encumbered by a mortgage to Christian D. Waidlich, executed by the said Margaret Roberts; that said Margaret Roberts died testate, at Whitley county, Indiana, and devised said real estate, in fee simple, to the children of this plaintiff and her husband, Jonathan Roberts, with a life estate to said Jonathan Roberts, and

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conditioned further for the payment of certain legacies to the defendant and others in said will named; that Christian D. Waidlick assigned said mortgage to Charles Cox, who is the son of the defendant; that said Charles Cox foreclosed said mortgage in the Whitley Circuit Court, and said premises were duly sold by the sheriff of Whitley county, Indiana, on the 22nd day of January, 1898, to the defendant, Mary E. Cox; that subsequently said Mary E. Cox agreed with this plaintiff that she would assign said certificate of purchase to the plaintiff for the sum of \$750, and that she would make said assignment at the Farmers Bank, at Columbia City, Indiana, whenever this plaintiff procured and was ready to pay said sum of \$750; that it was afterwards agreed that Jonathan Roberts, husband of this plaintiff, could enter upon said premises in the fall of 1898, and sow the same to wheat; that, in accordance with said agreement, said Jonathan Roberts did sow on said premises thirty acres of wheat; that, prior to the 31st day of January, 1899, this plaintiff procured \$750, and was ready and willing to pay the same at the Farmers Bank at Columbia City, Indiana, to the defendant, Mary E. Cox, for an assignment of said certificate of purchase, and notified said Mary E. Cox to that effect; that said Mary E. Cox, defendant, failed, and neglected, and refused to go to said bank and receive said money and assign said certificate of purchase, but, disregarding her said contract, has presented said certificate of purchase to the sheriff of Whitley county, and has obtained from him a deed of conveyance for said real estate, and is now claiming to be the owner thereof, and is giving it out in public speech that this plaintiff and her husband have no right to, and shall not, harvest the wheat crop now growing on said premises, and that they have no right to, nor has the plaintiff any right to or interest in said real estate; that said real estate is fairly and reasonably worth the sum of \$1,500; that this plaintiff obtained the money with which to purchase said certificate at great cost,

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damage, and expense to herself; that, by reason of the failure of said defendant to assign said certificate of purchase to the plaintiff, she has lost said real estate, and the surplus remaining therein over and above said \$750, and she has been damaged by the failure, neglect, and refusal of said Mary E. Cox to comply with the terms of her agreement, in the sum of \$1,000, for which she demands judgment, and for all other and proper relief."

It is argued by counsel for appellant that the agreement declared upon is within the statute of frauds, and is not enforceable. On demurrer, it will be presumed—the contrary not being alleged—that the agreement counted upon was verbal, and, if the agreement is such as is required by the statute of frauds to be in writing, the objection may be taken by the demurrer for want of sufficient facts. If the contract declared upon be one for the sale of lands, or interest therein, then it falls within §6629 Burns 1894, subd. 4, and, to be enforceable, must be in writing.

The owner and holder of a sheriff's certificate of sale of real estate is the owner of an interest in the real estate described in the certificate, and it is an interest which the holder can transfer and protect. *Gable v. Seiben*, 137 Ind. 155. In the case last named, Howard J., speaking for the court, said: "Section 6466 R. S. 1881 provides that 'the owner or occupant of any land sold for taxes, or any other person having an interest therein, may redeem the same at any time during the two years next ensuing. That the owner of the sheriff's certificate of sale of real estate has an interest in such real estate seems too plain for argument. The fact that such interest may not ripen into ownership by reason of redemption from sale or other cause does not show that the interest is not a real one.'"

The contract sued upon in the case at bar was a contract by which appellant was to part with whatever interest she had in the land, and it is immaterial whether that interest was a legal or equitable interest. Thus, it is said in 8

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Am. & Eng. Ency. of Law, p. 695: "Clearly, every contract for the sale of the legal title to real estate is within the statute; but it applies to contracts for the sale of the equitable title as well; thus for the sale of an equity of redemption, whether from a mortgage, a trust deed, a judicial sale, a tax sale, an execution sale, or however such an equity of redemption may arise."

That the fourth section of the statute of frauds extends to and embraces equitable as well as legal interests in land is well settled. Brown on Stat. of Frauds, §229; Reed on Stat. of Frauds, Vol. 2, §723.

In the case of *Hughes v. Moore*, 7 Cranch. (U. S.), 176, 3 L. ed. 307, in an opinion by Marshall, C. J., it is held that an agreement between A and B by which B was to pay A a certain amount of money to compensate A for damages done him on account of B having procured a patent for land in his own name, when it should have been in the name of A, is a contract within the statute of frauds, and must be in writing.

In the case of *Scott v. McFarland, Adm.*, 13 Mass. 309, it is held that "the right in equity of redeeming real estate mortgaged is such an interest in land as cannot by our statute of frauds be passed by parol."

That the owner of a sheriff's certificate of sale is a proper redemptioner is settled law in this State. *Gable v. Seiben*, 137 Ind. 155.

In *Junkins v. Lovelace*, 72 Ala. 303, it is held that an agreement to redeem from a sale of mortgaged lands under execution, and to allow the mortgagor the benefit of said redemption in case the mortgagor paid the redemptioner the amount expended by him, with interest, is within the statute of frauds, and not enforceable unless in writing.

In the case of *Clark v. Condit*, 18 N. J. Eq. 358, it is held that an equity of redemption is such a right or estate in lands as cannot be released or conveyed except in writing. To the same effect was *Van Keuren v. McLaughlin*, 19 N.

J. Eq. 187. An agreement which amounts substantially to a transfer of any interest in land has always been held to be within the statute. Agnew on Stat. of Frauds, p. 151.

In the case of *Smith v. Burnham*, 3 Sumn. 435, Justice Storey says: "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands; and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third person, or otherwise, is clearly a sale of an interest in the lands within the statute of frauds. A partnership to buy contracts for the sale of lands is a partnership for the purchase of an equitable interest in those lands."

In *Whiting v. Butler*, 29 Mich. 122, it is held, in an opinion by Justice Cooley, that the equitable interest in lands acquired by the purchaser at an execution sale was an interest capable of assignment and sale, but the contract for such sale or assignment was within the statute of frauds, and, to be enforceable, must be in writing. See, also, *Grover v. Buck*, 34 Mich. 519.

In the case of *Daniels v. Bailey*, 43 Wis. 566, it is held that the sale of an interest in a certificate of sale of standing timber is a sale of an interest in land, and, if by parol, is void by the statute of frauds.

The contract for the transfer of the certificate of sale declared upon in appellee's complaint was voidable merely. It was not void. The statute simply prohibits the bringing of an action to enforce it. The parties may fully execute their contract if they desire, but they cannot be compelled to do it by any action in law or equity. *Hadden v. Johnson*, 7 Ind. 394.

It was early held in this State that the closer the provisions of the statute of frauds are adhered to, consistent with control of judicial authority, the better. *Ball v. Cox*, 7 Ind. 453.

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The certificate of sale of real estate, representing as it does an interest in the real estate, it necessarily follows that a contract to sell or transfer such certificate is a contract to sell or transfer an interest in land. Such a contract is within the statute of frauds, and, to be enforceable, must be in writing. It follows that the court erred in overruling the demurrer to the complaint. The judgment is reversed, and the cause is remanded, with instructions to the lower court to sustain the demurrer to the complaint.

Wiley, J., dissents.

WHETSELL, ADMINISTRATOR, v. LOUDEN, ADMINISTRATOR.

[No. 8,209. Filed June 29, 1900.]

WILLS.—Election by Widow.—Statutory Allowance.—Testator by the terms of his will gave all of his property real and personal to his wife, except certain partnership property. The widow caused the will to be probated and took possession of all of the property given her and disposed of the personal property for her own benefit, leaving the creditors of the estate without anything from the personal property to apply on their debts. She afterward for a valuable consideration conveyed her interest in the lands to creditors. *Held*, that she was not entitled to her statutory allowance of \$500.

From the Monroe Circuit Court. *Affirmed*.

P. R. Wadsworth and *W. Q. Williams*, for appellant.

J. H. Loudon and *T. J. Loudon*, for appellee.

BLACK, J.—In a statement of claim filed by the appellant as administrator of the estate of Margaret Bollenbacher, deceased, against the appellee as administrator *de bonis non* of the estate of George Bollenbacher, deceased, it was shown, in substance, that one John C. Whisnand was by the court below duly appointed as administrator of the estate of said George Bollenbacher, deceased, and accepted the trust, and as such administrator filed an inventory in that estate, by which it was shown that said Margaret Bollenbacher, who was the widow of said George, received from

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said Whisnand, administrator, \$12.50, as a part of her statutory allowance; that she died intestate in November, 1898; that she never received any part of the \$500 due her, other than said sum of \$12.50; that the appellant, in 1898, was duly appointed by the Daviess Circuit Court of this State as administrator of the estate of said Margaret, deceased, and accepted the trust; that he has never, as such administrator, received any part of said statutory allowance; and that there is due the appellant as such administrator from the appellee, administrator *de bonis non* of the estate of said deceased husband, \$487.50, the remainder of such allowance.

The appellee answered in two paragraphs, the first being a general denial. A demurrer to the second paragraph of answer was overruled, and this ruling is assigned as error.

In the second paragraph of answer it was alleged that in 1885, and prior thereto, said husband resided at Bloomington, Monroe county, Indiana; that in September of that year he died testate, leaving surviving him said Margaret Bollenbacher, his widow, and several children; that on the 25th of September, 1885, said widow caused his will to be filed in the office of the clerk of the Monroe Circuit Court, where it was duly admitted to probate on that day, and duly recorded, etc. A copy of the will is set out in the answer, its dispositive items being as follows: "Item 1. I give and bequeath to my beloved wife, Margaret Bollenbacher, all of the property of which I shall die seized, both real and personal, of whatever description and wherever situated, for her use and benefit and profit so long as she shall remain my widow and single, or during her natural life, except my interest in the firm of Bollenbacher & Sons, engaged in the manufacture of spokes, including my interest in the real and personal property belonging to said firm. Item 2. I give and bequeath to my sons Martin C., William P., Samuel M. and Jacob Q. Bollenbacher, equally, share and share alike, all the interest in the said firm of Bollenbacher & Sons of which

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I shall die seized, including my interest in the real and personal property belonging to said firm. Item 3. Upon the marriage of my wife, Margaret, or at her death, I desire and direct that all my real estate of which I shall die seized, and all my personal estate then remaining, shall be equally divided, share and share alike, between my children," naming them, twelve in number, including those named above in the second item. In the next and last item the widow of the testator was named as executrix.

It was further alleged in the answer that said widow under and by virtue of said will and §2505 R. S. 1881, as amended in 1885, took possession of all of said property "so devised to her," including a large stock of boots and shoes which the testator had on hand at his death, worth over \$2,000, and appropriated the same to her own use, and disposed thereof for her own benefit, leaving the creditors of said estate without anything from the personal property to apply on their debts; that by virtue of said will and said statute, she also took possession of certain real estate, described, in Monroe county, consisting of certain lots in the city of Bloomington and thirty-one acres of land; that no administration was had on said estate until the fall of 1894, when John C. Whisnand was appointed administrator with the will annexed of said estate and qualified as such; that all the personal property of the estate that he could find amounted to \$12.50; that the personal property of George Bollenbacher at his death amounted to \$2,000 or more; that claims being filed against said estate amounting to \$5,304, said administrator filed in the court below a petition for an order to sell said real estate; that while said petition was pending said Margaret, widow of said testator, proposed to a bank named that, as it held a large claim against said estate, it should buy her interest in said real estate; that the bank thereupon accepted her proposition, and, in consideration of \$1,000 paid her by the bank, she, on the 17th of April, 1895, executed to the bank a warranty deed, con-

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veying and warranting to the bank all her right, title, and interest in and to said real estate, which deed was recorded, etc., on the 1st of June, 1895; that at the time she sold and conveyed said real estate to the bank "there was no place for her to get any statutory allowance except out of said real estate."

The election of a widow under §2505 R. S. 1881, as amended in 1885, §2666 Burns 1894, §2505 Horner 1897, relates to her choice whether she will retain her right by statute to one-third of the lands of her late husband, or will take lands devised to her by him in a provision made for her by his will in lieu of her statutory right in his lands. It is not the election between the absolute allowance of \$500 provided by §2424 Burns 1894, §2269 Horner 1897, and the provisions made for her in his will. The last mentioned statute provides that the widow of a decedent, "whether he die testate or intestate," may select and take articles named in the appraisement aggregating \$500, and that if she fail or refuse to select and take all or any part of such articles, she shall be entitled to the amount of the deficiency in cash out of the first moneys received by the executor or administrator in excess of the amount necessary to pay the expenses of administration and of the last sickness and funeral of the deceased; and if the estate be clearly solvent, she shall be entitled to such payment out of the first moneys received by the executor or administrator; and if the personal estate be insufficient for such payment to her in cash, the deficit shall constitute a lien upon the real estate of the decedent liable to sale for the payment of debts, which lien may be enforced, upon the petition of the executor or administrator, in like manner as lands of the decedent are sold for the payment of debts, and shall be superior to the lien of judgments upon such real estate rendered against the decedent.

The widow was not required by the terms of any statute in force at the death of her husband to elect as to whether

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she would take her statutory allowance of \$500. If she was required to make an election between that allowance and the provisions of her husband's will, the requirement would be referable to equitable principles. *Shipman v. Keys*, 127 Ind. 353; *Moore v. Baker*, 4 Ind. App. 115, 51 Am. St. 203.

She could not have the statutory allowance if she had chosen and enjoyed the provision made for her in the will, if the intention of the testator, as gathered from the terms of the will, was that she should not have both the statutory allowance and the provision made by the will. If to take both under the law and under the will would so derange the disposition of property made by the will as to defeat the intention of the testator, she could elect to take the statutory allowance or the provision made for her by the will, but she could not take both; and if she had already elected to take and was already in the enjoyment of the testamentary provision thus inconsistent with the statutory allowance, she could not maintain a claim for the latter. *Langley v. Mayhew*, 107 Ind. 198; *Hurley v. McIver*, 119 Ind. 53; *Shipman v. Keys*, *supra*; *Shafer v. Shafer*, 129 Ind. 394; *Like v. Cooper*, 132 Ind. 391; *Snodgrass v. Meeks*, 12 Ind. App. 70.

The widow having made no election in writing to take under the law instead of under the will, and having caused the will to be admitted to probate, and having entered upon the enjoyment of the provisions made for her in the will, as described in the answer, she is to be regarded as having elected to take under the will all that she did take and use and consume and sell and convey, and therefore as having assented to all the provisions of the will for others inconsistent with her claim under the statute.

The personal property of the appellee's testator had been exhausted. Pursuant to the terms of the will, it had been used and enjoyed by the widow, before the appointment of the appellee's predecessor in the trust except the sum

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of \$12.50, which also she had received, as alleged in the complaint, or statement of claim. The interest of the testator in the partnership property was directed by the will to go to certain sons named of the testator. The surviving partners by law were entitled to its possession and control to be disposed of for the benefit of themselves and the estate of the deceased partner, consistently with the rights of creditors. *Bollenbacher v. First Nat. Bank*, 8 Ind. App. 12; *McIntosh v. Zaring*, 150 Ind. 301, 312.

There was no source from which to draw the statutory allowance, but the real estate, which had been devised to the widow during her widowhood or for her life, then to go to designated children of the testator. The widow had conveyed by warranty deed all her interest in the real estate, and thereby had secured to herself a sum which she accepted as the equivalent of the interest therein devised to her.

If it would not be an assertion of a right inconsistent with her covenant of warranty for her to claim a lien upon the real estate for her statutory allowance, it would, it seems, be inconsistent with the intention of the testator thus to diminish the provision made by the will for his children after the termination of the interest in the real estate given by the will to the widow. It must be considered that it was no less his purpose thus to provide for his children than to provide thus for his widow; and his intention would be thwarted by the diminution of either provision for the benefit of the person or persons entitled by his will to the other provision alone.

We find no error in the overruling of the demurrer to the second paragraph of answer.

Judgment affirmed.

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BLUFFTON ARTIFICIAL ICE COMPANY v. RICHARDSON.

[No. 3,068. Filed May 17, 1900. Rehearing denied June 29, 1900.]

APPEAL AND ERROR.—Excessive Damages.—An assignment in a motion for a new trial in an action for damages for a breach of contract that the damages assessed were excessive presents no question, since the question of excessive damages can arise only in actions *ex delicto*.

From the Adams Circuit Court. *Reversed.*

A. L. Sharpe and C. E. Sturgis, for appellant.

G. W. Stults, L. Mock, J. Mock, France & Merryman and T. B. Dickens, for appellee.

ROBINSON, J.—Suit by appellee for damages for alleged breach of a contract. Special finding of facts, with conclusion of law and judgment in appellee's favor for \$195.67. Appellant excepted to the conclusion of law and moved for a new trial.

The special findings are sustained by the evidence, and in this particular we can not disturb the trial court's conclusion. The conclusion of law was correctly stated in appellee's favor if the amount named therein is right.

By the contract sued on the appellant agreed to furnish and appellee to take a certain quantity of ice at an agreed price during a certain period. Upon appellant's failure to furnish the ice as agreed appellee was compelled to and did purchase ice elsewhere at various times in order to supply his customers. The damages allowed appellee consist of the increased price he was compelled to pay, as he purchased ice from time to time, over and above the contract price with appellant and certain necessary expenses, all together being the actual increased cost of ice purchased from time to time by appellee from other parties, and which, under the contract, should have been furnished by appellant. The damages, as shown by the findings,

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are thus limited. It is not found as a fact that appellee sustained any loss by reason of the difference in the quality of the ice, nor is it found as a fact that anything is due him as interest. The findings show appellee owed appellant a balance of \$26.35 on ice purchased from appellant.

In order to question the assessment of damages a party must assign as a cause for a new trial the specific reason that the amount awarded is erroneous. The fourth reason for a new trial is that the damages assessed by the court are excessive. This presents no question, as the action is *ex contractu*, and the question of excessive damages can arise only in actions *ex delicto*. §568 Burns 1894, §559 Horner 1897; *White v. McGrew*, 129 Ind. 83; *Louisville, etc., R. Co. v. Renicker*, 17 Ind. App. 619; *Smith v. Barber*, 153 Ind. 322.

The aggregate of the amounts stated in the several findings is \$188.67; less \$26.35 is \$162.32, for which judgment should have been rendered.

Judgment reversed, with instructions to restate the conclusion of law.

THE MOREWOOD COMPANY v. SMITH ET AL.

[No. 8,410. Filed April 17, 1900. Rehearing denied June 29, 1900.]

CONTRIBUTORY NEGLIGENCE.—*Personal Injuries.—Master and Servant.*—In an action by an employe for personal injuries sustained while working about a machine in defendant's factory, a finding by the jury that it was not necessary that plaintiff should come in contact with the cog-wheels which caused the injury, in the proper performance of his duties, and that he came in contact with said wheels through his own thoughtlessness and inattention, shows negligence of plaintiff contributing to his injury, and precludes a recovery. pp. 267-270.

MASTER AND SERVANT.—*Employe Acting Under Orders.—More Hazardous Employment.*—The rule that where a master orders a servant to do something not contemplated in his employment it does not necessarily follow that the servant either assumes the increased risk or is negligent in obeying the order although the risk is equally

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open to the observation of both, can only apply where the servant is ordered from his usual employment, temporarily, to do something not connected therewith *pp. 270, 271.*

From the Grant Circuit Court. *Reversed.*

H. J. Paulus and *O. L. Cline*, for appellant.

W. S. Marshall and *C. G. Gordon*, for appellees.

HENLEY, J.—This cause was appealed to the Supreme Court and by that court transferred to the Appellate Court on the 3rd day of March, 1900.

This is an action for damages commenced by appellee by his next friend, Charles F. Feltis, against appellant. The injury is alleged to have been caused by the negligence of appellant. Appellant and appellee occupied the relative positions of master and servant. There are three paragraphs of complaint in all substantial respects alike. In appellee's amended third paragraph of complaint it is averred: That appellee is an infant under the age of twenty-one years, and that appellant is a corporation engaged in the manufacture of tin-plate; that on the day the injury occurred he was seventeen years old, ignorant and inexperienced in working in and about the factory, all of which was well and fully known to the appellant; that he was employed by the appellant to work in their said factory, which consisted of large buildings in which was operated a vast amount of machinery, and in which were employed more than 600 men, boys, and girls; that at the time said injury occurred he had been in the employ of appellant for about two years in what was known as the cold roll department; that said work was not complicated, hazardous, or dangerous, and he was fully able and competent to perform the same; that on the morning of the day upon which he received his injury, and just prior to the time he began work, the appellant ordered and directed him to go to work in what was known as mill number eight in the "hot roll" department; that the character and nature of the new work

he was ordered to do was different from his former employment, the new work being dangerous and hazardous, the appliances and machinery different, the place dissimilar, and the employes working therein new and strange; that he had neither time nor opportunity to acquaint himself with the place wherein he was to work, nor with the machinery which he was compelled to use; that he was wholly inexperienced and unacquainted with the duties he was called upon to perform, all of which was well and fully known by appellant; that appellant gave him no instructions about his new work, nor did they caution him in any manner about the danger and hazard of the place, nor of the defective and unsafe machinery; that on the morning of the day aforesaid, in obedience to appellant's orders, he commenced work; that a part of his duties consisted of gathering up scraps of iron that were cut off by said mill number eight, to pack, tie, weigh, and pile them up and to carry to the shear-men of said mill the iron sheets that were to be trimmed and squared, and to pile them on his table beside him ready for use; that said scraps of iron were cut by shears attached to a table about two feet wide and two and one-half feet long and two feet high; this table was open beneath, and said shears were operated by two iron cog-wheels situated about eighteen inches from the end of the table at appellee's left; that one of said wheels was about one foot in diameter and the other about two feet in diameter; the top of the lower and smaller wheel was about eight or ten inches above the floor; that an iron bar or shaft extends from the lower cog-wheel some six inches above the floor under the aforesaid table, by means of which the shears were operated; that it was necessary for appellee in the discharge of his duties to stoop over said iron bar and to step over the same and likewise to reach across said bar in order to pick up scraps of iron which were cut off by said shears; that the appellant negligently and carelessly set appellee at work in this hazardous and unsafe place

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and near and close by said cog-wheels; that said cog-wheels were defective and dangerous on account of their being uncovered and unguarded; that said wheels could have been covered at a trifling expense and without impairing their usefulness; and that by reason of their said uncovered condition, appellee was exposed to great and unnecessary risks and dangers, on account of which negligence and carelessness on the part of appellant said appellee on the day aforesaid, while stooping down at the end of said table and near to said cog-wheels, and while engaged in proper and necessary duties, and while using due care and caution, without any negligence or fault upon his part, his left hand was caught and drawn into said cog-wheels and was so badly crushed that it had to be amputated; that said defective, unsuitable, and dangerous machinery, and the unsafe and hazardous place where he was set to work were fully known and understood by the appellant, but were unknown to appellee when he was ordered and set to work in and about the same; that the plaintiff did not and could not realize, understand, or comprehend his dangerous position until he was injured as aforesaid, and he did not have sufficient judgment or understanding to comprehend and grasp the dangers to which he was exposed; that if said cog-wheels, as aforesaid, had been fenced, guarded, or boxed, and said machinery suitable and safe for the purpose for which it was intended, he would not have been injured while engaged in his said duties as above set forth. Appellant filed a general denial to each paragraph of complaint. There is no question as to the sufficiency of the pleadings.

The cause was submitted to a jury and a verdict returned in favor of appellee. With the general verdict the jury answered and returned sixty-four interrogatories. The only question in this cause arises upon the action of the court in overruling appellant's motion for judgment upon the findings of fact, notwithstanding the general verdict.

By the answers to the interrogatories, the jury found

that at the time of the injury appellee was seventeen years old; that he had, prior to said time, worked in the cold roll department of said mill for more than two years; that the injury occurred on the 16th day of April, 1897, while appellee was in appellant's employ; that appellee had been engaged in the department of appellant's factory where he was working at the time he received his injury prior to said time; that the cog-wheels by which appellee's hand was injured were exposed to view and easily to be seen, and appellee was acquainted with the nature and purpose of said wheels, and had frequently seen said wheels prior to the time of his injury. In the cold roll department, where appellee had been employed, there were large steel and iron rollers working against each other, and it had been a part of the duties of appellee to pass plates of iron through such rollers and to catch plates of iron when they were so passed through. On the date of the injury to appellee, he was five feet and ten inches tall, and weighed 135 pounds. That appellee had worked in the hot roll department of appellant's mill a part of a day before the day on which he was injured. That the injury was caused by appellee getting his hand caught in two revolving cog-wheels; that the diameter of the larger wheel was twenty-four inches, and of the smaller wheel seven and one-half inches; the center of the smaller wheel was situated directly above the center of the larger wheel; an iron shaft passed through the center of the lower wheel and extended east and west and rested upon bearings at each end; the upper wheel was similarly arranged. Appellee was at the time the injury occurred working at what was known as "number eight shears," performing the duties of "scrap-boy;" that from the point on said cog-wheels where said wheels meshed together to the nearest corner of the scrap-table it was twenty-eight inches, and it was twenty-two inches from the point where said wheels meshed to the floor. The scrap-table was twenty-four inches high. The lower blade of the shears was fixed,

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or stationary; on the east side of the shear blades there was an iron table on which the pieces and scraps of iron fell when the shears were in use; this table was known as the scrap-table; it was thirty inches long and twenty-seven inches wide, one side was supported by iron legs, the other side joined up to and was attached to the lower blade of the shears. Appellee worked at the east and north side of the table, and in removing the scraps therefrom carried them away "from the direction of said cog-wheels." The shears were operated by a man called a "shearman," who stood on the west side of the shears and who was operating the shears at the time the injury occurred. The scraps which were cut off fell upon the iron table on the east side of the shears. That appellee's injury was caused by his "thoughtlessly and thinkinglessly" getting too close to the cog-wheels while they were in motion. When appellee received his injury, he was upon his right knee with his left hand upon and projecting over his left knee, and that his injury resulted from thoughtlessly and by inattention placing himself in a kneeling position too near the cog-wheels. Appellee knew the purpose and object of the cog-wheels, and it was not necessary in the performance of his duties at the time he was injured to get against, work with, or in any manner touch the cog-wheels by which he was injured. Appellee understood the nature of the work he undertook to perform and was performing on the day he was injured. He understood the nature of said cog-wheels. He knew the effect of permitting his person or clothing to come into contact with said wheels while they were in motion. Appellee's minority is not of itself sufficient to change the rule that contributory negligence will defeat a recovery. *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Stewart v. Patrick*, 5 Ind. App. 50. The appellee was a boy seventeen years old, of ordinary intelligence. He knew the location of the cog-wheels. They were plainly exposed to view. There was no hidden danger.

He knew the effect of coming in contact with the wheels. It was not necessary that he come in contact with the wheels in the performance of his duty. The case is very similar to the case of *Stewart v. Patrick, supra*. In the last mentioned case, the injured party was a boy sixteen years of age, who was set to work at a machine which in part consisted of a platform or table in front of revolving knives. The boy was injured while wiping the platform of the machine in front of the revolving knives. It was not necessary for him to do this in the performance of his duty, and such facts appearing in the answers to interrogatories, this court reversed the judgment of the lower court, which had been rendered upon the general verdict. In the case of *Atlas Engine Works v. Randall, supra*, the Supreme Court of this State repeat an old established rule to the effect that where the danger to be encountered is equally open and observable to the master and servant, and the servant is injured by reason of his own inattention and negligence, there can be no recovery. See, also, *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417; *O'Connor v. Whittall*, 169 Mass. 563, 48 N. E. 844; *American Carbon Co. v. Jackson*, 24 Ind. App. 390; *Wabash R. Co. v. Ray*, 152 Ind. 392; *Big Creek, etc., Co. v. Wolf*, 138 Ind. 496.

If we accept the rule of law announced in the case of *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, as applicable to this case, such rule being to the effect that when a master orders a servant to do something not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. The facts found preclude a recovery because it is stated by the jury that it was not necessary that appellee come in contact with said cog-wheels in the proper performance of his duties, and that he came in contact with said wheels through his own thoughtlessness and inattention. The rule as announced in the *Hoodlet*

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case can only apply where a servant is ordered from his usual employment, temporarily, to do something not connected therewith. If it meant other than this, the boy, for example, who entered the mill as "feeder" in the cold roll department, who being retained by the master is advanced through all the various departments as his age and experience would warrant would at no time assume the dangers incident to any employment except that of "feeder." In all cases falling within this rule, a distinction must be drawn between dangers growing out of or connected with the manner in which the servant does the work, and those dangers naturally incident to the service in which he is engaged. In this case, the answers to the interrogatories clearly fix appellee's negligence contributing to his injury. The facts found are in irreconcilable conflict with the general verdict. The judgment is reversed, with instructions to the lower court to sustain appellant's motion for judgment.

DE COUDRES, ADMINISTRATRIX, v. THE UNION TRUST
COMPANY OF INDIANAPOLIS.

[No. 8,094. Filed October 2, 1900.]

EXECUTORS AND ADMINISTRATORS.—Execution of Mortgage.—Personal Liability.—A will gave the executor power to mortgage decedent's real estate to pay debts. The executor mortgaged the real estate without order of court and afterward reported the execution of the mortgage to the proper court and the same was approved. The mortgage was given to secure the payment of certain promissory notes executed by the executor as such. The mortgage referred to the power given by the will, and contained a personal covenant on the part of mortgagor to pay the sum secured. The proceeds derived therefrom were applied to the payment of the decedent's debts and the discharge of liens upon the real estate mortgaged. Default was made in the payment of the notes and the mortgage was foreclosed and the land sold for a sum less than the amount of the debt. *Held*, that the executor was personally liable for the deficiency. pp. 272-278.

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EXECUTORS AND ADMINISTRATORS.—Mortgages.—Personal Liability.—

Interpretation by Parties.—Where a mortgagee foreclosed a mortgage executed by an executor upon his decedent's estate, the act of foreclosure did not affirm the proposition that the debt was the debt of the decedent's estate and not that of the mortgagor so as to bind the mortgagee and prevent him from proceeding against the mortgagor personally for a deficiency in the payment of the debt by the sale of the mortgaged premises. *pp. 278, 279.*

From the St. Joseph Circuit Court. *Affirmed.*

A. L. Brick, F. Dunnahoo and S. Parker, for appellant.

A. Anderson, J. Du Shane and W. G. Crabill, for appellee.

COMSTOCK, J.—David W. Reece died testate April 18, 1889. Louis De Coudres, as executor, was given power by the will to sell or mortgage the decedent's real estate to pay debts. For this purpose he sold one tract and mortgaged another without the action of the court, but reported the sale in the one case and the execution of the mortgage (not of the notes) in the other, to the proper court, and both were confirmed. The proceeds derived from the sale and the mortgage were applied to the payment of debts of the testator and the discharge of liens upon the real estate mortgaged. The mortgage was given to secure the payment of the notes. The mortgage and notes were made by the executor as such. The mortgage referred to the power given by the will, and contained a personal covenant to pay, its language being as follows: "And the mortgagors expressly agree to pay the sum of money above named without relief from valuation laws." It contained the following further provision: "And it is further expressly agreed that until all of said notes are paid said mortgagor will keep all local taxes and charges against said premises paid as the same become due, and, failing to do so, the said mortgagee may pay such taxes, and the amount so paid, with eight per cent. interest thereon, shall be a part of the debt secured by this mortgage."

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Louis De Coudres died in 1895, and his widow, Sarah De Coudres, was appointed administratrix of his estate.

Default having been made in payment of the notes, the appellee brought a suit in the St. Joseph Circuit Court against the heirs and devisees of David W. Reece to foreclose the mortgage, and recovered judgment of foreclosure and an order for sale of the land in question, but no personal judgment or decree against the estate of David W. Reece, and the land was sold under the decree of foreclosure, and bid in at sale by the appellee for less than the amount of the debt, there being a deficiency of \$2,172.06; and the appellee then filed this claim against the estate of Louis De Coudres, claiming that by the execution of the notes and mortgage mentioned Mr. De Coudres became personally liable for the payment thereof.

The claim was transferred to the issue docket, and trial had, and the St. Joseph Circuit Court found that the unpaid balance of the mortgage indebtedness was \$2,172.06, and that the estate of Louis De Coudres was liable for that sum, and rendered judgment for the same against appellant. From this judgment appellant has taken this appeal, and the only question to be decided by this court is as to whether or not, by the execution of the notes and mortgage aforesaid, the executor became personally liable for the payment of the debt.

The question before us has been settled, in our opinion, by the decisions of our Supreme Court.

In *Cornthwaite v. First Nat. Bank*, 57 Ind. 268, Cornthwaite was sued on a promissory note made by him and others, and in his answer it was stated, in substance, that the note sued on was given in renewal of a note given by the intestate; that the defendant, having been appointed and qualified as administrator, signed the note in that capacity, and for no other consideration; that he had no individual interest in the transaction, but that the note was given by

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him as an administrator for the purpose of binding the estate of the intestate, and that it was so understood by all of the parties liable thereon. A demurrer was sustained to this answer, and it was held by the Supreme Court that Cornthwaite could not bind the estate of the decedent, but bound himself as principal.

In the case of *Botts v. Barr, Adm.*, 95 Ind. 243, the same rule is applied. This was an action which was brought against Barr, who was administrator, and it was alleged in the first paragraph of complaint that at the time of the death of the intestate there were sawlogs in the plaintiff's log yard, and afterwards the defendant, Barr, agreed with the plaintiff to pay a certain amount of money for sawing the same; that the plaintiff sawed the lumber for the defendant, and that the debt was due and unpaid. It is said by the court: "The cause of action here stated is not within the statute, §2310 R. S. 1881, because it is not 'for the recovery of any claim against the decedent', and it is not within the first clause of §4904 R. S. 1881, because the agreement stated is the original agreement of the defendant upon a sufficient consideration. 'The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor, when he does not stipulate for exemption from such liability.'" The same rule was applied to the second paragraph of the complaint.

In the case of *Long v. Rodman*, 58 Ind. 58, in speaking of the contracts of executors and administrators, the court says: "The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor, when he does not stipulate for exemption from such liability."

The case of *Carter v. Thomas*, 3 Ind. 213, was an action of assumpsit brought against one Chancey Carter, in his

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individual capacity, as acceptor of an order drawn on him by one McKeen. The acceptance sued on was as follows: "Accepted, to be paid when funds are received for the estate. C. Carter, Administrator." The evidence in the case showed that funds to the amount of \$300 belonging to the estate had, subsequently to the acceptance, come into the hands of said Carter, and that in August, 1850, payment of the acceptance was demanded of him and refused; that Carter had resigned as administrator before the commencement of the suit, and that administrators *de bonis non* had been appointed; and the court found for the plaintiff in the sum of \$128. The Supreme Court affirmed the judgment, saying: "It seems that 'if an executor or administrator promises, in writing, that in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on his promise in his individual capacity, and the judgment against him will be *de bonis propriis*.'" "

In *Holderbaugh v. Turpin*, 75 Ind. 84, 39 Am. Rep. 124, which was a suit brought against Holderbaugh on an agreement to submit certain matters to arbitration, and that each party should, under certain conditions, pay one-half of the costs, the court say: "The mere fact that the matters submitted to arbitration grew out of an action prosecuted by the appellant as administrator does not warrant the inference, as against the positive allegations of the complaint, that he bound himself only in the capacity of administrator." It is further said on page 87 in the same case: "'The whole case shows that the object of the plaintiff was to charge the estate of the deceased, by obtaining a judgment against the administrators *de bonis intestati*. The promise of administrators, on a consideration originating subsequently to their intestate's death, cannot sustain such an action.' * * *

The undertaking of appellant was upon a consideration which accrued subsequently to the death of the intestate, and was to do a thing which the intestate's estate was not bound to do. It is impossible, in view of the authorities

cited and the character of the undertaking itself, to regard it otherwise than as the promisor's original contract."

Mills v. Kuykendall, 2 Blackf. 47, was an action of assumpsit by the appellee against Mills and Harness, as administrators, on a written agreement to pay money out of an estate. The question was whether the estate could be held on a promise made by the administrators. The court say, among other things, speaking of this action of assumpsit, that "The promise of administrators on a consideration originating subsequently to their intestate's death, cannot sustain such an action." And proceeding further, say: "The fatal objection to the count is that the plaintiff in his suit goes altogether against the administrators in their representative character—against the estate of the intestate, when, by his own showing, that estate has nothing to do with his cause of action, and can in no way be affected by it."

While the will in the case at bar gave authority to sell or to mortgage the real estate, it did not give authority to execute the promissory notes. The execution of the notes was not essential to the execution of the mortgage; it was not a necessary incident thereto; neither the express promise of the mortgagor to pay the mortgage, nor the execution of the notes, was necessary. By the terms of the mortgage, the mortgagor agreed to warrant the title to the land, and promised to pay taxes and attorney fees. By these promises, which are free from ambiguity and not to be explained by extrinsic evidence, the mortgagor was made personally liable. The rule is thus stated in Jones on Conv. §831: "A person executing a conveyance in a representative capacity such as an executor, guardian, or trustee, with the covenants for title usual in other deeds is personally bound by them though he is under no obligation to make any of them and had no authority to bind the estate he represented by such covenants." See, also, *Sumner v. Williams*, 8 Mass. 162; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Whiting v.*

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Dewey, 15 Pick. 428; Thornton & Blackl. on Adm., pp. 142, 143, 144; 1 Randolph on Com. Paper, 134; Williams on Ex. (6th Am. ed.) 186; 1 Parsons on Bills & Notes, p. 161.

Counsel for appellant refer to the case of *Neptune v. Paxon*, 15 Ind. App. 284; but that was a case where certain stock belonging or supposed to belong to a bank was put in the name of Tyler to hold as trustee for the bank. The stock belonged to the bank and the bank received all dividends thereon. For some undisclosed reason, the trustee gave his note to the bank for the face of the stock, signing it "W. M. Tyler, Trustee for the Bank." From all that appears in the case, the note was entirely for the benefit of the bank, which was in fact not only the payee of the note but also the party ultimately liable as maker. The court in that case say that a person signing such a contract "is the principal, unless it clearly appears that he is simply signing for another whose identity is unmistakable." But in the case in question there was not any other person for whom De Coudres could act. He had no principal. He could not act as agent for the decedent, nor did he, nor could he act for the heirs, nor could he act for or bind any estate in giving the notes sued on. He clearly comes within the rule that "the person signing the obligation is the principal, unless it clearly appears that he is simply signing for another" who can be identified.

Counsel cite *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. ed. 266, which was a case which the court say was unambiguous. It was a case where there was a principal, who could be, and, in fact, was, identified by the signature to the note sued on. This is a well considered case; many authorities are referred to; and in every case where an agent signing his name to a contract was relieved of responsibility, he had a principal for whom he was acting.

Ames v. Holderbaum, 44 Fed. 224, was a bill in equity filed for the foreclosure of a mortgage executed by an execu-

tor under power given him by a will which empowered the executor to "stand in his (testator's) place and stand for the purpose of managing and controlling" testator's "property," and to "negotiate loans," and "execute mortgages." The executor borrowed \$6,000, for which he gave notes and executed a mortgage on land of the testator. The question arising and determined in that case was not whether the executor was liable on his express contract as shown by his notes, but whether the mortgage was valid and could be enforced against the devisees of the land. The court decided that the mortgage was valid, and nothing further.

Counsel for appellant contend that inasmuch as appellee elected to foreclose its mortgage on the land, it could not thereafter collect the deficiency from the estate of the mortgagor; that the act of foreclosure affirmed the proposition that the debt was the debt of the testator's estate and not that of the mortgagor. This position is not well taken; the notes could not have been properly filed against the estate; the foreclosure of the mortgage was a proceeding *in rem* against the mortgaged land; no personal judgment was taken against any one. In this connection counsel for appellant cite *Reissner v. Oxley*, 80 Ind. 580, and *Johnson v. Gibson*, 78 Ind. 282.

In the case first given, the court holds that parties to a contract may put their own interpretation upon it so long as the result is not a contract which is in itself unlawful; further, that when a contract is of doubtful meaning, resort may be had to proof of the situations and circumstances of the parties when they made it, and of their transactions under it, for the purpose of ascertaining the true intention. The personal covenants in the mortgage are not ambiguous. The case is not in point. In the second case, suit was brought against the president of a corporation, who had executed a mortgage given by him for the company as its president. The holder of the mortgage foreclosed it and took personal judgment against the corporation. The court

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held that having treated the mortgage as the mortgage of the corporation and not that of its president, and having obtained not only a decree of foreclosure but also a personal judgment—then, upon the promise contained in the mortgage, it was properly held that he was bound by the interpretation put upon it. The Supreme Court, however, declined to decide “whether the mortgage, considered apart from all the other circumstances, is that of the corporation, or that of the” president.

In the case at bar, the notes were not filed as claims against the estate of the decedent. It is contended that if the mortgagor had paid the debt he would have been entitled to subrogation as to the mortgage. Let this be admitted. But the mortgagor did not pay the debt. There is nothing in the record to show that the land did not bring its full value; there is nothing to indicate that his rights were prejudiced by the extension of the time given to secure the debt.

The executor having warranted the title to the real estate, and having expressly promised to pay the debt for which the notes were given, became personally liable.

Judgment affirmed.

EVERETT v. STUCK.

[No. 8,210. Filed October 2, 1900.]

PLEADING.—*Recovery Only Upon Theory Declared Upon.*—In an action upon the *quantum meruit*, to recover for work and labor done, there cannot be a recovery upon an express contract.

From the Allen Superior Court. *Reversed.*

R. S. Robertson and W. S. O'Rourke, for appellant.

P. B. Colerick and H. Hanthorn, for appellee.

WILEY, J.—This action originated before a justice of the peace. The complaint is as follows: “Comes now the plaintiff and says that the defendant is indebted to him in the sum of \$125 for work and labor performed by the plain-

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tiff for defendant and at the defendant's request. Plaintiff says said sum of money is due and unpaid." Prayer for judgment.

The appellant did not file any answer, and the case proceeded to trial and judgment under the issue made by the statute. There was judgment before the justice, and also on appeal to the Allen Superior Court, for appellee.

One of the errors assigned is the overruling of the motion for a new trial, and this is the only question appellant has discussed.

Appellee has not filed any brief, and we are left in ignorance of his theory of the case, only in so far as it is disclosed by the record. It is evident, however, from the complaint, that the action was upon the *quantum meruit*, to recover for work and labor done.

The first and second causes for a new trial are: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law.

A brief statement of the undisputed facts as disclosed by the record will suffice to show that the judgment can not stand. It is shown that appellant is a married woman and lives with her husband. The evidence of the appellee, one Phillip Kantz, and Charles E. Everett (appellant's husband) discloses the uncontradicted and undisputed fact that Charles E. Everett employed appellee as hostler and to do general chores about his barn and house, for which he agreed to pay him \$28 per month. Appellee commenced his service under that contract July 11, 1898, and quit his employment November 5th, following. August 22, 1898, Everett paid appellee \$20 by check, and about August 25th, he (Everett) was called to Tennessee on business. Before going, he arranged with another party to pay appellee an additional sum of \$17. Everett returned from Tennessee about the 22nd of the following November. While Everett was in Tennessee, appellee frequently asked appellant for money, and inquired of her and others when he (Everett)

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would return. He also stated to appellant that he would be willing to wait for his pay if he thought Mr. Everett would be home by November 23rd. There is not a word of evidence that appellant ever employed appellee. That he was employed by Mr. Everett, and was to be paid by him, under the original contract, there is no dispute. Appellant testified that on or about October 24th appellee brought to her a paper written by an attorney for appellee, and wanted her to sign it, saying that he had purchased a wagon some time before on credit; that he was unable to pay for it; that the vendors were threatening to take it from him, and that if she would sign the paper they would give him longer time. This evidence is not contradicted. Appellant thereupon signed the following instrument: "Fort Wayne, Ind., Oct. 24, 1898. In consideration of services rendered myself and husband by Jay Stuck and in consideration of the wages now due said Stuck for services rendered my husband, C. E. Everett, I agree to and with said Stuck to be responsible for any and all wages due said Stuck while he may be in the employ of my husband and also responsible to said Stuck for any sums of money now due to him and unpaid. [Signed] Mrs. C. E. Everett." This instrument, prepared for appellee by his attorney, aside from all the testimony, discloses the fact that there is no liability on the part of appellant upon the theory of the case adopted by appellee.

The rule is firmly settled in this State that a party can not sue upon one theory and recover upon another. A party must recover *secundum allegata et probata*, or not at all. *Sanders v. Hartge*, 17 Ind. App. 243, and authorities there cited.

Here appellee sued upon the express theory that appellant employed him to perform certain labor for her. The evidence shows she never employed him, but that his employment was by her husband. If she is liable to appellee, it is upon her written assumption of her husband's obligation and her written promise to pay. As to whether she is

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liable under such assumption and promise, we do not decide, for the question is not before us. What we do hold is that appellee wholly failed to make a case under the evidence upon the theory of his complaint.

The judgment is reversed, and the court below directed to sustain appellant's motion for a new trial.

NEW PITTSBURGH COAL AND COKE COMPANY v. SHALEY.

[No. 8,199. Filed October 8, 1900.]

CORPORATION.—Employment of Physician for Injured Employee.—
Authority of Agent.—The employment of a physician by the manager of a private corporation, to render medical and surgical treatment on behalf of an employe who had been injured while in the line of his duty, will not bind the corporation, in the absence of a showing that such employment was within the scope of the manager's authority.

From the Sullivan Circuit Court. *Reversed.*

John S. Bays, for appellant.

Hendrich & Hamill, G. W. Buff, W. R. Nesbit and Paul Stratton, for appellee.

HENLEY, J.—The appellant commenced this action against appellee upon an open account for coal sold by appellant to appellee. Appellant is a corporation. Appellee's answer is in three paragraphs. The first paragraph of answer is a general denial; the second a plea of payment. The third paragraph, which was held sufficient to withstand a demurrer for want of facts by the lower court, avers that appellee has been for a long time a practicing physician in the city of Terre Haute, Indiana, and that at the time of and prior to the commencement of this action appellant was, and still is, indebted to appellee in the sum of \$75 for professional services rendered by said defendant as such physician, a bill of particulars of which is filed with and made a part of the answer. That said services were done and performed at the instance and request of the appellant to and

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on behalf of one Robert Schoonover, who was in the employ of appellant, and who, while in the line of his duty as appellant's servant and employe, received severe personal injuries by reason of which said servant suffered extreme torture and severe pain and required immediate relief in the way of medical attention. That one Frank Shoemaker was at said time the manager of appellant's office and yards in said city of Terre Haute; that the principal office of said appellant is in the city of Chicago; that said Shoemaker was at said time the highest officer of appellant present in said city and knew of the injuries received by said servant, and on behalf of the appellant employed appellee to render to said servant such medical aid and attention as he required and his said injuries demanded. Appellee avers that he did under such employment render to appellant's servant such medical aid and attention as said servant's injuries demanded and that such services were reasonably worth the sum of \$75, which amount he asks to be allowed as a set-off against any amount found due appellant, and that he have judgment over for any balance due him.

The trial resulted in a verdict and judgment in favor of appellee for \$10.10.

It is insisted that the lower court erred in overruling the demurrer to the third paragraph of answer. The case of *Chaplin v. Freeland*, 7 Ind. App. 676, is decisive of the question here presented. In the case cited, the court, by Gavin, C. J., says: "Usually an injured employe procures and pays for his own attendance, and then, if his employer be in the wrong, recovers this sum from his employer with his other damages. Whether or not such an extreme case might arise as would justify or require the court to impose on individual employers a duty analogous to that imposed upon railroad companies, it is unnecessary for us to determine. There are here no facts showing any emergency, save the necessity for the immediate services of a surgeon. No necessity for action by the employer is shown. It does

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not appear but that the injured man was possessed of abundant means to provide for himself, nor does it appear that he lacked friends and relatives both able and willing to provide for him."

It is not alleged in this answer that the employment of a physician for injured employes came within the scope of the duties of Shoemaker, who is alleged to have been the manager of appellant at the city of Terre Haute, and we can not hold as a matter of law that such employment would come within the scope of the duties of the manager of a coal company.

It has often been held that the manager of a railroad had authority to employ physicians and to bind his company for their services, and the same power has been given subordinate officers of railroads in cases of emergency. *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Toledo, etc., R. Co. v. Mylott*, 6 Ind. App. 438; *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

The reasons for such a rule as is applied to railway companies do not obtain in this case. Why such a rule is not applicable is fully discussed in the case of *Chaplin v. Freeland*, 7 Ind. App. 676.

The lower court erred in overruling appellant's demurrer to the third paragraph of appellee's answer.

Judgment reversed, with instructions to the lower court to sustain the demurrer to the third paragraph of answer.

TECUMSEH FACING MILLS v. SWEET, DEMPSTER &
COMPANY ET AL.

[No. 3,283. Filed October 3, 1900.]

SALES.—Rejection of Goods.—Possession by Vendee.—Pleading.—In an action for goods sold and delivered defendant filed a special answer or counterclaim alleging that the goods were sold by sample and that under the agreement defendant had the right to reject inferior goods furnished; that inferior goods were delivered and defendant promptly rejected the faulty goods, notified plaintiff

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thereof and asked instructions as to what disposition should be made of the inferior goods, and that plaintiff refused to receive back the goods so rejected or to substitute acceptable goods therefor. *Held*, that the facts pleaded do not bring the case within the rule that when goods are kept by the vendee in his possession the presumption arises that the goods were of the kind bought and satisfied the contract of sale, and that the answer was good as against a demurrer for want of facts. *pp.* 285, 286.

APPEAL AND ERROR.—Exceptions.—The action of the court in overruling a motion for a new trial will not be considered on appeal, where it is not shown that any exception was taken to the ruling on the motion at the time it was made, but that an exception was taken on the following day and a motion for a *nunc pro tunc* entry made and overruled, and no error assigned on such ruling. *p.* 286.

From the LaPorte Superior Court. *Affirmed.*

J. F. Gallaher, for appellant.

M. T. Krueger, C. R. Collins and *J. B. Collins*, for appellees.

ROBINSON, C. J.—Appellant sued appellee for a balance due for goods sold and delivered. Answers in denial, payment and special answer or counterclaim. Errors are assigned upon the overruling of the demurrer to the special answer or counterclaim, and overruling the motion for a new trial.

The special answer or counterclaim is good against a demurrer for want of facts. The pleading contains some surplusage, but we think it sufficient. It proceeds upon the theory that the contract, under which the goods mentioned in the complaint were furnished, was not complied with by appellant to appellee's damage in a specified manner. The goods were sold by sample and appellee had the right to reject inferior goods furnished. It is argued that the pleading fails to show a rejection of any of the goods; but the pleading alleges that it was agreed that appellee might reject any faulty or inferior goods, not pay for them, and hold them subject to appellant's order; that inferior goods were delivered; that appellee promptly informed ap-

pellant that appellee had rejected the inferior and faulty goods, and demanded of appellant to instruct appellee what disposition appellant desired to be made of the rejected goods, and that appellant failed and refused to receive back such worthless goods so rejected or to substitute acceptable goods therefor. The pleading shows what the agreement was with reference to rejected goods and that appellee acted in accordance with the agreement. The facts pleaded do not bring the case within the rule that when goods are accepted or kept by the vendee in his possession, the presumption arises that the goods were of the kind bought, and satisfied the contract of sale.

The record shows that the motion for a new trial was overruled on the 19th day of the April term. No exception was taken to the ruling at the time. A record entry shows that on the following day an exception was taken to the ruling on the motion for a new trial. It also appears by a bill of exceptions that on the following day appellant moved for a *nunc pro tunc* entry showing that its exception to the motion for a new trial was taken on the 19th day of the term. This motion was submitted upon affidavits and counter-affidavits, and was overruled. No error has been assigned upon this ruling, and no question is presented.

As the record comes here it is not shown that any exception was taken to the ruling on the motion for a new trial at the time the ruling was made. Appellant has not complied with that provision of the statute that "The party objecting to the decision must except at the time the decision is made; * * *." §638 Burns 1894; Ewbank's Manual §24. In the case at bar the rule may seem technical, but there is no good reason for making an exception to the rule, which, in its general application, is a salutary one. See *Coan v. Grimes*, 63 Ind. 21; *Hull v. Louth*, 109 Ind. 315, 333; *Brown v. Ohio, etc., R. Co.*, 135 Ind. 587; *Radabaugh v. Silvers*, 135 Ind. 605.

Judgment affirmed.

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EVERITT, SEEDSMAN, v. INDIANA PAPER COMPANY.

[No. 2,982. Filed May 11, 1900. Rehearing denied Oct. 3, 1900.]

CONTRACTS.—Construction.—Evidence.—Plaintiff entered into a contract to furnish defendant a certain quantity of paper to match the paper of an old catalogue for quality, finish and appearance, the “weight to be on the basis of 37x48, 53 lbs., 500 sheets.” There was evidence that the paper met the requirement as to quality, finish, and appearance, but there was a conflict as to whether the paper furnished reached the weight required by the contract. There was no evidence that any of it fell below fifty pounds, and there was evidence that it is impossible to make all sheets alike in weight, and that fifty pound paper would print just as good a job as fifty-three pound paper, and unless the paper was put on the scales the difference would not be known. *Held*, that the evidence showed a substantial compliance with the contract. *pp. 287-290.*

APPEAL AND ERROR.—Evidence.—Objections.—Only the grounds of objection presented to the trial court can be considered on appeal as against the ruling of the court. *p. 290.*

EVIDENCE.—Contracts.—Customs and Usages.—In an action on a contract to furnish a certain quantity of paper the “weight to be on basis of 37x48, 53 lbs., 500 sheets,” evidence that such specification had a particular meaning to the paper trade, and that it was the usage, where a weight is specified, to include the weight of wrappings necessary safely to transport it, unless otherwise specified in the contract, was admissible as an aid in the interpretation of the contract. *pp. 290-293.*

From the Marion Superior Court. *Affirmed.*

J. E. Florea and *G. Seidensticker*, for appellant.

R. O. Hawkins and *H. E. Smith*, for appellee.

ROBINSON, J.—Appellee sued upon the following agreement: “Order from J. A. Everitt, Seedsman. Indianapolis, Ind., Nov. 9, 1895. To Indiana Paper Co. P. O. City. Deliver to our printers, as instructed with later specifications. [Signed] J. A. Everitt, Seedsman. 53,000 lbs. book paper at \$3.75 per cwt.

“This paper is to match the paper in our 1894 catalogue for quality, finish, and appearance, except the color is to be white like sample attached marked ‘J. A. E.’ and attached

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to this copy marked 'C. E. G.' Weight to be on basis of 37x48 53 lbs., 500 sheets. Specifications for size will be given early next week. Delivery to be made one-half Dec. 10th or before, one-half Jan. 1st or before. Terms, ninety days.

"Accepted. Indiana Paper Co., per Claude E. Geisendorff, 'C. E. G.,' 'J. A. E.' Match as nearly as possible for color."

It is averred that after a part of the paper was furnished, appellant refused to accept any more, and refused to pay for the part delivered; that appellee then had on hand a quantity of the paper which it had caused to be manufactured especially to fill this contract and which was, because of its size and quality, unmerchantable.

Appellant answered, general denial, payment, and special defense that appellant, desiring to publish a catalogue for 1896, appellee represented it would furnish the same kind of paper used in the 1894 catalogue, and in consideration of such representations appellant entered into the written agreement sued on and thereby purchased from appellee 53,000 pounds of white book paper of the same kind, class, grade, and quality that was used in its 1894 catalogue; that appellee knew the purpose for which the paper was to be used, and undertook that every fifty-three pounds delivered should make 500 sheets of paper thirty-seven by forty-eight, no more no less; that the paper appellant used was delivered to its printers and used by them before it learned of its quality, but immediately upon learning of the quality and weight notified appellee not to deliver any more of that quality but to deliver the paper purchased, which appellee failed to do; that 500 sheets would not weigh fifty-three pounds, was unfit for appellee's use, and worth not to exceed \$2.50 per hundred weight; that appellant was compelled to go into the market and pay \$4.60 per hundred weight for paper to complete its catalogue, causing appellant a loss in a named sum, for which judgment is asked.

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Upon a trial by the court appellee had judgment. Motion for a new trial overruled. The only questions discussed arise on this ruling.

The contract must be construed as a whole. The contract calls for 53,000 pounds of paper to match the paper in the 1894 catalogue for "quality, finish and appearance except the color", but this must be taken in connection with that part of the contract which says, "weight to be on basis of 37x48, 53 lbs., 500 sheets. The contract does not necessarily mean that the paper shall be like the sample in weight. The quality, finish, and appearance are to be gathered from the sample, and we can only conclude that the parties did not intend that the weight should be so determined, because they made distinct provision for determining that in another way.

We can not read into the contract the word "net" immediately after "53,000 lbs. book paper", as argued by counsel. That term, in commercial transactions, has a fixed and definite meaning. *Scott v. Hartley*, 126 Ind. 239.

The evidence upon some questions in issue was conflicting. This evidence we can not weigh. Whether there was a substantial compliance with the contract by appellee was a question to be determined from all the evidence. The contract required the paper to match the paper of the old catalogue for quality, finish, and appearance. There is evidence that the paper furnished by appellee did this. There was a conflict as to whether the paper furnished reached the weight required by the contract. Appellant required that the weight should not exceed fifty-three pounds, and there is no evidence that it did. There is no evidence that any of it fell below fifty pounds. There is evidence that it is not possible to make all sheets alike in weight, and that fifty pound paper would print just as good a job as fifty-three pound paper, and unless the paper was put on the scales the difference would not be known. We can not say that there is no evidence from which the court could say that

there had been a substantial compliance with the contract by appellee.

Appellant argues that appellee was permitted, over objection, to contradict the terms of the written contract by showing a usage in the paper trade as to the manner of weighing paper like that in question, and that such usage was not pleaded. No objection was made to the introduction of this evidence on the ground that it was not within the issues presented by the pleadings, but the ground of objection was that the evidence tended to contradict a written contract. But, as stated by the trial court at the time, the evidence was admitted not to contradict the contract, but as an aid in its interpretation by applying the usage of the particular business to the construction of the contract. Only the grounds of objection presented to the trial court can be considered on appeal.

It was shown in evidence that "53,000 lbs. book paper, weight to be on basis 37 x 48, 53 lbs., 500 sheets" has a particular meaning peculiar to the paper trade; that such an order means 1,000 reams of fifty-three pounds to the ream; and that it was the usage, where a weight is specified, to include the weight of wrappings necessary safely to transport it, unless otherwise specified in the contract. The evidence of a number of witnesses experienced in the paper business, that such a usage exists, was not contradicted. As it was shown that the above provision has a particular meaning always used, it is presumed the contract was made with reference to that meaning. It can not be said that the evidence contradicts the express terms of the contract. The record shows that the evidence was admitted for the purpose of showing what was meant by the terms used—not to contradict the contract but as an aid in its interpretation by applying the rules of the particular business.

Nor can it be said that such a usage is unreasonable, contrary to law, or opposed to public policy. In *Morningstar v. Cunningham*, 110 Ind. 328, it is said: "Parties who are

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engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may, therefore, in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business, as ordinary incidents thereto. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277; *Florence Machine Co. v. Daggett*, 135 Mass. 582; *Fitzsimmons v. Academy, etc.*, 81 Mo. 37; *Cooper v. Kane*, 19 Wend. 386; *Kelton v. Taylor*, 11 Lea (Tenn.) 264, 47 Am. Rep. 284, 7 C. L. J. 383."

There was evidence tending to show that appellant had knowledge of the usage in question. Mr. Everitt testified that he had "had considerable experience and quite varied experience in purchasing paper". From this evidence, and the fact that he did not deny knowledge of such a usage, the court might conclude that he had such knowledge.

It can not be said of the contract that it was so plain in its terms as to the manner of weighing the paper that there could be but one conclusion. The total weight was to be "on the basis" of "37x48, 53 lbs., 500 sheets."

In *Walls v. Bailey*, 49 N. Y. 464, a party who had contracted in writing to do certain plastering at so much per square yard charged for the full surface of the walls without deduction for doors and windows and the like, and to support such charges he was allowed to prove a custom of plasterers in the city so to measure and charge.

In *Wilcox v. Wood*, 9 Wend. 346, proof of a local custom, that a lease from the first day of May in one year to the first day of May in the succeeding year expires at noon of the last day, was held admissible.

In *Lowe v. Lehman*, 15 Ohio St. 179, where a party contracted to furnish and lay brick by the thousand, a local

custom as to how the number should be estimated was held not unreasonable.

In *Ford v. Tirrell*, 9 Gray 401, a contract to build a cellar wall at a certain price per foot, evidence of the usage of measuring such walls was admitted.

In *Barton v. McKelway*, 22 N. J. L. 165, under a contract to deliver trees not less than one foot high, it was held proper to show a usage of all dealers that the length was measured only to the top of the ripe wood, rejecting the green, immature top. See, also, *Soutier v. Kellerman*, 18 Mo. 509; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. 627, 21 N. E. 160, 4 L. R. A. 392; *Susquehanna, etc., Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; *Merick v. McNally*, 26 Mich. 374; *Featherston v. Rounsaville*, 73 Ga. 617; *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104; *Lane v. Union Nat. Bank*, 3 Ind. App. 299; *Scott v. Hartley*, 126 Ind. 239; *Van Camp, etc., Co. v. Hartman*, 126 Ind. 177.

It is well settled that usage can not be set up to contradict a contract. "But when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties." *Hinton v. Locke*, 5 Hill 437.

Appellee sued upon the contract as made. When it is shown that the usage exists, it is presumed that the contract was made with reference to it. It is not sought to contradict or vary the contract by the usage, but to interpret it according to the usage which the parties are presumed to have had in mind when the contract was made. The usage itself was incorporated in and became a part of the contract sued on. *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. 359; *Lyon v. Lenon*, 106 Ind. 567; *Leiter v. Emmons*, 20 Ind. App. 22; *Reissner v. Oxley*, 80 Ind. 580.

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It is further argued by counsel that the amount of recovery is erroneous, the same being too large. It is unnecessary to set out the evidence bearing upon this question. Suffice it to say there is evidence to sustain the court's finding in the amount named and for which judgment was rendered. Leaving out any question of interest, there is evidence to sustain the finding. From the whole record we think the case was properly decided upon its merits. Judgment affirmed.

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[No. 8,175. Filed October 4, 1900.]

TRIAL.—Pleading.—Amendment After Close of Evidence.—In the trial of an action in replevin it was disclosed by the evidence that the property in question was involved in a former attachment suit and that plaintiff was present with his attorney and the defense therein made was that plaintiff was the owner of the property then in controversy, but it was decided in such case that it was the property of another. *Held*, that the action of the court in permitting defendant at the close of the evidence to file an additional paragraph of answer setting up such matters was not error. *pp.* 294-296.

PLEADING.—Answer.—Former Adjudication.—In an action in replevin an answer that the title to the property in question had been judicially determined against plaintiff's claim of ownership in an attachment proceeding in which trial plaintiff was present in person and by counsel to protect his interest in the property was good as against demurrer. *pp.* 296, 297.

From the Fayette Circuit Court. *Affirmed.*

R. Conner, L. Conner and J. E. Watson, for appellant.

Edgar O'Hair, D. W. McKee, J. I. Little and H. L. Frost, for appellee.

WILEY, J.—This was an action in replevin in which appellant was plaintiff and appellee defendant. The complaint is in the ordinary form, and as its sufficiency is not questioned no further reference need be made to it. The case was put at issue by an answer in denial and submitted

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to a jury for trial. After the evidence had been heard, the appellee asked and was granted leave to file an additional affirmative paragraph of answer, to which appellant objected and excepted. To this additional paragraph of answer the appellant demurred for want of facts, which demurrer was overruled, and he refused to plead further. After the filing of the additional paragraph of answer and the overruling of the demurrer thereto, the jury were re-sworn. The appellant refused to argue the case to the jury, and, after argument by counsel for appellee, the jury were instructed by the court, and subsequently returned a verdict for the appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict.

The only questions raised by the assignment of errors and discussed by appellant are: (1) The action of the court in permitting the appellee to file the additional paragraph of answer, and (2) that the court erred in overruling the demurrer to such additional paragraph of answer.

The decision of the questions thus raised necessitates a brief statement of the facts disclosed by the record and the material averments of the pleading in question. September 20, 1897, Charles Pepper and Louis Pepper commenced an action in attachment in the Franklin Circuit Court against Seymour J. Merrell and Edward Personett, and a writ of attachment was issued and levied upon the property described in appellant's complaint. The appellee herein was the sheriff of said county and charged with the execution of the writ. November 6, 1897, appellant commenced this action in the same court. Summons was served, appellee appeared, and appellant, on December 9, 1897, moved for a change of venue from the county, and the venue was changed to the court below. December 11, 1897, the first above mentioned action was tried in the court where it was commenced, resulting in a verdict and judgment for the plaintiffs, and by which it was adjudged that the property attached—being the same as described in the complaint in

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this case—was the property of Merrell and Personett, and the appellee as such sheriff was ordered to sell it under the judgment. On the 1st day of June, 1898, the appellee filed in the court below his answer in denial, and the same day the case was submitted to a jury for trial. In the trial of the case below, the appellant was represented by one F. M. Alexander and other counsel. In the trial of the case at bar, it was disclosed by the evidence that appellant, in the case of Pepper and Pepper against Merrell and Personett, above referred to, employed the said Alexander as his attorney to represent him and protect his interests in said case; that he was present with his attorney at the trial of the case; that he sat by his counsel and advised with him in the examination of witnesses. These facts are all averred in the supplemental and additional paragraph of answer, and it is also averred that the said Alexander managed and conducted the defense in said case on behalf of the said Case and the nominal defendants therein. It is shown that in the trial of the Pepper case the defense was made that appellant here was the owner of the property in controversy, and he attempted to establish the fact by employing counsel, attending the trial in person, testifying as a witness, and advising with counsel during the progress of the trial.

It is urged by appellant's counsel that, under the facts disclosed by the record, it was an abuse of discretion of the trial court to allow appellee, after the close of the evidence, to file the additional paragraph of answer. The rule in this State has long been settled that it is within the discretion of the trial court to allow the filing of additional pleadings after the issues are closed, and even after the close of the evidence, and such action will not be reviewed except where it appears that there has been a plain abuse of such discretion.

In *Bever v. North*, 107 Ind. 544, the court by Elliott, J., said: "The matter of permitting the opening of the issues for the purpose of filing additional pleadings is to a

great extent a matter of discretion, and we cannot interfere with its exercise. It is only where it is made to appear that there was an abuse of discretion that we can reverse the judgment of the trial court." See, also, *Trees v. Eakin*, 9 Ind. 554; *Louisville, etc., R. Co. v. Hubbard*, 116 Ind. 193; *Burnett v. Milnes*, 148 Ind. 230; *Sandford, etc., Co. v. Mullen*, 1 Ind. App. 204; *Myers v. Moore*, 3 Ind. App. 226; *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. 266; *Peigh v. Huffman*, 6 Ind. App. 658; *Keck v. State, etc.*, 12 Ind. App. 119; *Diltz v. Spahr*, 16 Ind. App. 591; *Brandt v. State*, 17 Ind. App. 311; *Smith v. Byers*, 20 Ind. App. 51.

Another rule is that where the trial court has permitted amendments to be made to pleadings during the progress of the trial, and after the conclusion of the evidence, the adverse party must affirmatively show that he was prejudiced thereby, before he will be entitled to a reversal on that ground. See *Diltz v. Spahr, supra*, and cases there cited.

In the case before us, no showing is made that appellant was prejudiced by the amendment. Our conclusion on this point is that the court was not in error in permitting appellee to file the additional paragraph of answer.

Much that we have said is applicable to the second proposition discussed. The additional paragraph of answer was good against a demurrer for want of facts, for at least three reasons: (1) It disclosed the fact that during the introduction of evidence it developed that appellant had employed counsel in the case of Pepper and Pepper against Merrell and Personett, to protect his interest in the identical property in controversy here, he at the time and in that case claiming that he was the owner. (2) It avers facts that show that he was privy to that action and was bound by the judgment. See *Burns v. Gavin*, 118 Ind. 320; *Palmer v. Hayes*, 112 Ind. 289. (3) It averred the rendition of a judgment in a judicial proceeding showing that it had been solemnly adjudged in such proceeding that the title to the

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property in question was in a third person, and while it is held that such proof is provable under the general denial (see *Fruits v. Elmore*, 8 Ind. App. 278), no harm could come to appellant by specially pleading the fact.

Anything which tends to defeat the plaintiff's claim of title, where he asserts his claim of ownership by an action in replevin, may be proved under the general denial (see *Aultman v. Forgey*, 10 Ind. App. 397; *Shipman, etc., Co. v. Pfeiffer*, 11 Ind. App. 445), and it certainly follows that specially pleading any such facts in defense could not be harmful to the plaintiff.

The court did not err in overruling the demurrer to the additional paragraph of answer. Judgment affirmed.

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[No. 3,251. Filed October 4, 1900.]

TRIAL.—*Separation of Witnesses.*—*Violation of Court's Order.*—*Exclusion of Evidence.*—Where a witness disobeys an order of the court directing a separation of witnesses, a party, who is without fault, will not be denied the right of having such witness testify. pp. 298-302.

EVIDENCE.—*Opinion of Witness.*—*Bastardy.*—Where on a trial for bastardy the relatrix testified that the acts of intimacy between her and the defendant took place in a room where a man and his wife were sleeping, and that defendant came to her quietly from an adjoining room while the others were asleep, it was proper for the wife, who as a witness for defendant stated that she did not hear him enter the room, to testify that she was easily awaked. p. 302.

From the Monroe Circuit Court. *Reversed.*

J. R. East and *R. G. Miller*, for appellant.

J. E. Henley, *J. B. Wilson*, *R. W. Miers* and *E. Corr*, for appellee.

COMSTOCK, J.—Prosecution for bastardy. The relatrix testified that she was an unmarried woman; that on the 21st, 23rd, and 27th days of August, and on the 3rd day of September, 1897, she had sexual intercourse with the defendant. That she had her monthly sickness about the 29th of

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August, 1897, and did not have a return thereof afterwards; that she was delivered of a bastard child May 29, 1898, and that appellee was its father. She was sustained by the proof of admissions by the defendant of improper relations with her. Appellee, when arrested, escaped from the officers and fled to Illinois. He gave as a reason for his flight that he had been told that it was hard to get out of such a case. He testified that he had never had sexual intercourse with the relatrix. Two witnesses testified in behalf of appellee that they had had improper relations with the relatrix.

The first reason for a new trial discussed is the refusal of the court to permit one Otto Hotzer, who had been sworn as a witness in behalf of appellant, to testify. The witnesses, before a statement of the cause had been made, had been sworn and charged by the court not to be present during the hearing of the testimony. The witness having been called to the witness stand and sworn said that he had been in the court room and had heard a part of the testimony of the relatrix, but that he had not heard the instruction of the court; that he had not been served with process; that he knew nothing about any service; that he had come to hear the trial.

The attorneys for appellant stated that they were not personally acquainted with the witness Hotzer; did not know him; did not know that he had heard any part of the testimony of the relatrix or of any other witness. Appellant then proposed to prove by said witness the following facts: "That on the last of October or the first of November, 1897, said witness had a conversation with the defendant, James A. David, in which conversation the defendant told him (the witness) that he had the relatrix in a family way and asked the witness to tell him what kind of medicine to give her for it." The court refused to allow the witness to testify for the reason that the plaintiff and relatrix had been negligent in not having him properly served with process and in not preventing the witness from hearing the testimony of the relatrix.

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In support of the motion for a new trial, appellant filed the affidavit of the relatrix that she was present at the time the witnesses were sworn and instructed to retire from the court room, and when the witness Hotzer was placed upon the witness stand to testify in her behalf, but that up to that time she did not know that he was in the court room, or that he had heard the testimony or any part of the testimony of any witness. Also the affidavits of J. R. East and Robert G. Miller, that they were the only counsel for the plaintiff and were present during the trial of the cause, but that before the witness Hotzer was put on the witness stand, they did not have any knowledge of his presence in the court room, or that he had heard any testimony in the cause; that said witness had been served by copy of subpoena left at his last usual place of residence, as they were informed; that they did not directly or indirectly cause said witness to remain in the court room and hear any part of the testimony of the relatrix or that of any other person in the case.

We have given the foregoing statement of the evidence introduced to show the importance of that which was excluded.

In *Davis v. Byrd*, 94 Ind. 525, the trial court had ordered a separation of the witnesses; a witness for the appellant had notice, although not in the court room at the time it was made; he came into the court room and remained while several witnesses were testifying. It did not appear that appellant was in any way responsible for his presence or had any knowledge of his violation of the order of court. Upon motion of appellee, the testimony of the witness was excluded. The judgment of the trial court was reversed. The court say: "A witness who disobeys the order of the court excluding him from the court room should be punished, and severely punished, for his disobedience, but this punishment should fall on the guilty person, and not on an innocent party. It is difficult to imagine any principle of law which will justify the punishment of an innocent party

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for the contumacious behavior of a witness. A litigant has no authority over the witnesses subpoenaed by him, and is not answerable for their wrongful conduct, and he ought not to be denied a right because a wrong has been committed for which he is neither morally nor legally responsible. It may be a very serious punishment to be deprived of the testimony of a witness, and if the party is himself free from fault, this punishment should not be visited on him; if, however, he is in fault, if he has directly or indirectly influenced the witness to disobey the order of the court, or if he has knowingly suffered it, then it is but just that he should pay the penalty of his wrongful act by the loss of the witness' testimony. We hold the true rule to be this: Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. The modern authorities are overwhelmingly in favor of this doctrine. Mr. Bishop says: 'On the other hand, if the party was without fault, the judge has no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness. The testimony should be admitted, subject to observation to the jury. Such is the law in principle. * * * Other judges, less mindful of these reasons, appear to deem it within their discretion in all cases of disobedience to the order to reject the witness.' 1 Bishop Crim. Proc., §§1191, 1192. An English author gives this statement of the rule: 'But it seems to be now settled, that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence.' 2 Taylor Ev. 1210. The same doctrine is found in 2 Phillipps Ev. (5th Am. ed.) 744. Among the cases supporting the conclusion which we here announce are: *Davenport v. Ogg*, 15 Kan. 363; *Pleasant v. State*, 15 Ark. 624; *State v. Salge*, 2 Nev. 321; *Grimes v. Martin*, 10 Iowa

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347; *Bell v. State*, 44 Ala. 393; *Keith v. Wilson*, 6 Mo. 435; *People v. Boscovitch*, 20 Cal. 436; *Hopper v. Commonwealth*, 6 Grat. 684; *Gregg v. State*, 3 W. Va. 705; *Rooks v. State*, 65 Ga. 330; *Smith v. State*, 4 Lea (Tenn.) 428; *Bulliner v. People*, 95 Ill. 394.”

In *Burk v. Andis*, 98 Ind. 59, 60, one reason for a new trial was the refusal of the court to permit a witness to testify upon behalf of the defendant. The witness had been sworn, and had heard the court order him to stay out of the court-house while the witnesses were testifying, but paid no attention to it. The Supreme Court in the opinion, say: “The exclusion of the testimony of such witnesses has heretofore been intimated in Indiana to be a matter within the discretion of the court trying the cause, and it has been stated that whether the testimony of the disobedient witness was admitted or rejected, this court would not interfere unless it appeared that such discretion had been abused. *Porter v. State*, 2 Ind. 435; *Jackson v. State*, 14 Ind. 327. But in the recent case of *Davis v. Byrd*, 94 Ind. 525, this court said”, quoting the rule as above set out, and upon the authority of that case reversed the judgment.

In *Taylor v. State*, 130 Ind. 66, the trial court excluded a witness. In the opinion it is stated: “It appeared that the witness had not been subpoenaed, and did not know that she would be called upon to testify in the cause, but the appellant knew she was in possession of the facts which he proposed to prove by her. He and his counsel denied all knowledge of the fact that the witness was in the court room during the trial. The court nevertheless refused to allow her to testify in the cause. The fact proposed to be proved by her was material to the defense in the cause. We think the court erred in excluding the evidence of the witness.” Reference is made in the opinion to *Davis v. Byrd*, *supra*; *Burk v. Andis*, *supra*; and *State v. Thomas*, 111 Ind. 515.

In the case at bar, by the ruling of the court complained of, the State was deprived of material evidence to which it

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was entitled. It does not sufficiently appear that either the State or the relatrix was responsible for the non-compliance with the order of the court. Nor does it appear that the appellant was negligent in the manner of the service of process upon the witness. It does appear that counsel for appellant and the relatrix were ignorant of the presence of the witness. While the witness by the violation of the order of the court would render himself liable for contempt, the State could not by his misconduct alone be deprived of his testimony. Under the foregoing decisions, the court erred in excluding the offered evidence.

The other reasons for a new trial discussed are the admission of certain testimony of Mary N. Hadden and Joseph Hadden. The relatrix testified in her examination in chief that the acts of intimacy between her and the appellee had occurred in a room where Joseph and Mary Hadden and others were sleeping, and that the appellee had come to her bed quietly while the others were asleep. The appellee slept in an adjoining room. In behalf of appellee, Mary Hadden testified that she did not hear him get out of his bed at any time and go to the bed of the relatrix. She was then asked whether she was easily awakened after she had gone to sleep; appellant's objection to the question was overruled and the witness answered that she was easily awakened. Over the objection of appellant, Joseph Hadden was permitted to testify that his wife, Mary Ann Hadden, was easily awakened after she had gone to sleep. The objection urged to this action of the court is that the question called for an opinion, and not the statement of a fact. In this ruling there was no error. The opinion was one these witnesses were competent to give.

Judgment reversed, with instructions to the trial court to sustain appellant's motion for a new trial.

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[No. 8,182. Filed May 29, 1900. Rehearing denied Oct. 4, 1900.]

APPEAL AND ERROR.—Pleading.—Available error cannot be predicated upon the action of the court in overruling a motion to require plaintiff to separate into paragraphs the causes of action improperly joined. *p. 304.*

CONTRACTS.—Breach.—Contracts by Correspondence.—Complaint.—In an action for breach of contract of employment made by correspondence in which it was alleged that on a certain date plaintiff made his proposal by letter, stating the terms under which he would enter into the employment of defendant, and defendant, by letter, unconditionally accepted plaintiff's terms, the minds of the contracting parties met, and the contract was complete, and it was not necessary to make any previous correspondence a part of the complaint. *pp. 304-307.*

EVIDENCE.—Contracts by Correspondence.—Harmless Error.—In an action for a breach of contract of employment entered into by correspondence, the introduction in evidence of letters which passed between the parties prior to those in which the proposal was made and accepted was harmless, where there was nothing in such letters which would vary the contract sued upon. *pp. 307, 308.*

From the Marion Superior Court. *Affirmed.*

J. E. Florea, G. Seidensticker and C. A. Dryer, for appellant.

R. W. McBride and C. S. Denny, for appellee.

HENLEY, J.—This was an action for damages growing out of the breach of contract. The first paragraph of complaint declares upon a verbal contract; the second upon a written contract.

Appellant, a corporation, filed a written motion directed to each paragraph of complaint, asking that appellee be required to separate the causes of action, improperly joined therein, into paragraphs, and number them, which motion the court overruled. Appellant's demurrer was also overruled to each paragraph of complaint; thereupon appellant filed four paragraphs of answer addressed to each paragraph

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of complaint and a counterclaim in one paragraph. Appellee replied the general denial. The cause was submitted to the court for trial, which resulted in a judgment for appellee. Appellant's motion for a new trial was overruled.

The first question presented to this court arises out of the ruling of the lower court in overruling appellant's motion to require appellee to separate the causes of action improperly joined in each paragraph of complaint into paragraphs and to number them. It is not necessary that we examine into the merits of this motion, as the ruling of the court in any event was not available error and could not result in a reversal of the judgment. It would seem that the cases cited by appellant's counsel were directly in point, but the later decisions of the Supreme Court are squarely in conflict with the rule contended for by counsel. See *Wabash, etc., R. Co. v. Rooker*, 90 Ind. 581; *Mansfield v. Shipp*, 128 Ind. 55; *Richwine v. Presbyterian Church*, 135 Ind. 80; *Shaw v. Ayres*, 17 Ind. App. 614.

The next question arises upon the ruling of the lower court in overruling the demurrer to each paragraph of complaint. It is averred in the first paragraph of complaint that on the 15th day of January, 1897, appellee was employed by appellant to work for appellant as salesman and manager in appellant's seed store in Indianapolis, said employment being for the term of one year, for which service appellee was to receive the sum of \$15 per week payable at the end of each week. That on said day appellee entered upon said work and continued at said work until the 24th day of September, 1897, when appellant discharged him without cause, and refused to allow him to continue in said employment; that appellee has performed all of the conditions of said contract and agreement upon his part to be performed, and was ever ready, able, and willing to comply with the same; that he has been unable to obtain other employment elsewhere, and has lost his wages, profits, and advantages which he could have derived from said employment, to his damage in the sum of \$285.

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This paragraph of complaint was sufficient to withstand a demurrer for want of facts. The statement in the complaint that a certain amount was due and unpaid for services rendered under the contract of employment before appellee was discharged does not lessen the force of the material averments charging a breach of the contract and resulting damages.

The second paragraph of complaint declares upon a written contract of employment. The contract was made by correspondence which passed between the parties prior to the time appellee began work. The complaint being upon a written contract, it was necessary to the sufficiency of the complaint that the contract should be made a part of the complaint. It is argued by counsel for appellant that all the correspondence which went to make up the contract is not made a part of the complaint. Without stating in this opinion a great many of the allegations of the second paragraph of complaint leading up to the correspondence, which appellee contends was the contract of employment and which is made a part of his complaint, we set out only that part material to the discussion. On the 4th day of January, 1897, appellee addressed a letter to appellant, which in the due course of mail was received by appellant. This letter was as follows: "Philadelphia, Pa., Jan. 4, 1897. J. A. Everitt, Indianapolis, Ind. Dear Sir: Yours of Jan. 1st to hand. From it I infer that you offer me a position at \$15 per week for the year 1897 in addition to the money advanced for transportation, providing I do not leave you during the year. This makes a total of 52×15 equals 780 plus \$75 equals \$855. That is \$855 to be paid during the year. If I am correct please advise me. I will accept it and have sent in my resignation which I hope lets me off Saturday eve so that I can get off by the middle of next week and report to you by Jan. 14th. At any rate I will lose no time in coming. Your letter will reach me on Thursday which will confirm my impression. As to leaving

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you, I would not come if I thought there was the slightest danger, as I can have a position in New York at better salary in two or three weeks, but I prefer your place and Indianapolis under the circumstances. Awaiting your reply, I am Respt'y, H. R. Bassler, 2436 No. 32½ St."

On the 6th day of January, 1897, appellant wrote and mailed to appellee the following letter in reply to the above, which reply was in the due course of mail received by appellee at Philadelphia.

"Indianapolis, Ind., Jan. 6, 1897. H. R. Bassler. Dear Sir: Your letter came this morning. We reply at once, and will say your understanding is correct, and you should lose no time in making the change. Truly, J. A. Everitt Seedsman."

It is said in the case of *Havens v. American Fire Ins. Co.*, 11 Ind. App. 315: "It is well settled that a proposition made by one party by letter to another party at a distance, containing a specific offer which is unconditionally accepted by the latter, will constitute a valid contract between them. The primary question in such case is whether the correspondence shows an agreement upon which the minds of the parties met, or whether the negotiations are inchoate and unperfected until something should intervene and be determined in order to give it full effect." It does not matter what letters may have passed between the parties to this action prior to the letter of January 4, 1897, although appellee's letter of that date refers to prior correspondence. On January 4th, appellee made his proposal by letter stating the terms under which he would enter into the employ of appellant. On the 6th day of January of the same year, appellant, by letter, unconditionally accepted appellee's terms. The minds of the contracting parties met and a valid contract existed between them. It is alleged that appellee performed all the stipulations of said contract upon his part, but that appellant failed to perform the agreement upon its part, and without cause discharged appellee to his

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damage. This paragraph of complaint also contains the averment that appellee has been unable to obtain other employment since his wrongful discharge by appellant, although he had diligently sought for work. The second paragraph of complaint is not subject to the objections urged against it by appellant's counsel.

We next pass to the questions presented by appellant's motion for a new trial. It is insisted that the amount of recovery is erroneous and excessive, and that there is an entire want of evidence to support the judgment. Counsel for appellee in their brief say that they base their right to recover in this cause solely on the second paragraph of complaint, which declares upon a written contract; hence we will not consider the argument of appellant's counsel based upon the insufficiency of the evidence to support the first paragraph of complaint. Upon the second paragraph of complaint, appellee introduced evidence to support every material allegation of his complaint. He was compelled to follow the theory of his complaint and to support that theory with competent evidence upon every material allegation. The correspondence which appellee made a part of his complaint, and which he alleges was the contract entered into with appellant, was introduced in evidence upon the trial. Appellee also introduced evidence tending to prove the breach of this contract upon the part of appellant, its performance on the part of appellee, and the damages resulting to appellee by the action of appellant in refusing to perform its part of the contract. This evidence supported the theory of the complaint, and this court will not pass upon the weight to be given it. The introduction in evidence of other letters which passed between the parties prior to January 4, 1897, was improper, under the averments of the second paragraph of complaint, but might have been proper under the averments of the first paragraph of complaint as tending to establish a contract, part in writing and part in parol. Their introduction, in

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any event, was harmless, because there was nothing in the letters which would change or vary the contract sued upon.

Appellant had the burden of proof to establish its counterclaim. That appellant had a perfect right to discharge appellee, if there was a breach of the contract of employment upon appellee's part, there can be no doubt. Neither the motive that prompted the discharge nor the intention of appellant could be inquired into. The only issue to be established in such case is whether there was a breach of the contract of employment upon the part of the servant. *Wood on Master and Servant*, 229; *Pape v. Lathrop*, 18 Ind. App. 633.

The testimony of appellant was in conflict with that of appellee upon the issue raised by appellant's counterclaim. The question was passed upon by the lower court. The whole record shows that upon every issue appellant was given a fair and impartial hearing. We find no error. Judgment affirmed.

EVANSVILLE AND TERRE HAUTE RAILWAY COMPANY v.
WELCH.

[No. 8,188. Filed October 5, 1900.]

DAMAGES.—Negligence.—Proximate Cause.—Railroads.—Where defendant negligently ran its locomotive through the streets of a town at a dangerous and unusual rate of speed and struck a person and hurled his body at and against plaintiff, who was standing on the platform of defendant's station, and injured him, such injury was not the natural and probable consequence of defendant's negligence, and plaintiff cannot recover damages therefor.

From the Sullivan Circuit Court. *Reversed.*

J. E. Iglehart, Edwin Taylor, and J. T. Hays, for appellant.

John S. Bays, for appellee.

HENLEY, J.—The appellant by proper assignment of error questions the ruling of the lower court in holding

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appellee's complaint good against a demurrer for want of sufficient facts. The facts stated in the complaint are substantially the following: That the town of Farmersburg is incorporated and has about 1,000 inhabitants, and is provided with streets, sidewalks, and alleys; that appellant has and maintains a depot and station in said town which is located near the central part of said town at the west side of appellant's track and immediately along the side thereof; that the south end of said station abuts on the main street in said town, which street is called Liston street; and that the platform of said station runs along the east side and the entire length thereof; that said street runs east and west through the entire length of said town and crosses appellant's track just east of the south end of said station; and that appellant's track runs north and south through said town, and that running parallel with said track through said town is a certain side-track or switch; that there are a large number of buildings in said town on both sides of said appellant's track and along the line of said Liston street and at and near appellant's said station; and that at all times of day large numbers of persons pass to and from the east and west portions of said town along said street and across appellant's said tracks, and large numbers of persons congregate at and on the platform of appellant's said station for the purpose of taking passage on appellant's passenger train number two, especially just before the incoming of appellant's said passenger train, which facts the appellant well knew. In order to make said crossing safe for persons passing along said street, it was necessary that appellant keep the view along said tracks unobstructed and free from all things calculated to obstruct the view, so that persons crossing said tracks at said street could see the approach of locomotives and cars; and that if said side-track had cars located thereon it was necessary to insure the safety of passengers that the locomotives should be run at a low rate of speed when crossing said street; that on the 12th of Jan-

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uary, 1898, one William Bostic, a resident of said town who resided on the east side of said railroad track and along the line of said Liston street, left his home for the purpose of going to the station of said appellant for the purpose of taking passage on its said passenger train number two, which was due to arrive from the south at 10:30 a. m.; that after said Bostic left his home, he proceeded west on said Liston street to where said street crossed the railroad track, side-track, etc.; that at the time the said Bostic approached the said tracks for the purpose of crossing them, there was and had been a long time prior thereto a large number of flat cars and box cars carelessly and negligently placed on said side-track, which said cars completely obstructed the view from the south of one who was passing along the line of said street, making said crossing dangerous at said point if an engine or train of cars propelled by an engine was run at a great or unusual rate of speed, all of which facts were well known to appellant; that, by reason of said obstructions, it was dangerous to all persons on or about said station platform and to persons attempting to cross said track if an engine should be run with great and unusual speed by and past said point and over and across said street at or near the time when said passenger train number two would be due at said station, all of which facts appellant well knew; that while said Bostic was on the opposite side of the track in the act of crossing said track, and just before said passenger train was due to arrive at said station, a locomotive known as a "wild engine", in charge of the agents and employes of appellant and running upon the time of train number two and at the time said train number two should arrive at said station, was run upon and across and over appellant's track and through said town, and was by appellant's servants and agents carelessly and negligently run at a dangerous, reckless, and unusual rate of speed along, across, and over appellant's main track where the same crossed Liston street, to the great danger of all persons who might be attempting

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to cross said track at said time, all of which facts were well known to the appellant. Said William Bostic was attempting to cross said street toward the west and to approach said station for the purpose of taking passage on appellant's train when said "wild engine," running as aforesaid, suddenly, carelessly, and negligently ran upon and against the said Bostic, killing him instantly and hurling his body at and against appellee, who was then and there standing upon the platform of appellant's said station, with such force that appellee, without any fault or negligence on his part, was knocked down, bruised, mangled, and crippled, for which injury he demands judgment in the sum of \$5,000. It is further averred in the complaint that at the time appellee was so struck as aforesaid, he was in company with a large number of persons standing upon the platform of the station of appellant with the knowledge and consent of the appellant; that he resides in said town and is engaged in the livery business therein, and that in connection with his said business he attends the incoming of all appellant's trains at said station for the purpose of soliciting customers who may arrive on said trains; all of which he does with the knowledge and consent of appellant, and all of which facts appellant well knew.

The above strange and unusual facts are relied upon by appellee as showing actionable negligence upon the part of appellant proximately causing appellee's damage. Was appellee's injury the natural and probable consequence of the negligence charged to appellant, and was his injury such as might or ought to have been foreseen in the light of the attending circumstances?

In the case of *Davis v. Williams*, 4 Ind. App. 487, the court said: "It is not every tortious act that makes the perpetrator liable in damages if injury occurs, even if such injury is, in some sense, produced or influenced by it. If in any such case some other power or force, beyond the control of the original actor, may be justly said to constitute the

more direct cause, and the result following the primary cause was extraordinary, unusual, or unnatural, and the consequences for which damages are claimed were not such as might have been reasonably anticipated, the first cause will be considered too remote to be taken in law as the proximate or efficient one."

It is possible that persons may be injured in the manner in which appellee received his injury. Sufficient proof of this is the fact that appellee was so injured. But such an injury can not be said to be one which the most prudent man would have anticipated. The manner in which appellee was injured was unusual and extraordinary and contrary to common experience. It was such an injury as could not have been foreseen or reasonably anticipated as the probable result of appellant's negligent acts. Under such circumstances there is no liability. *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. St. 293; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 16 N. W. 388; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. 193; *City of Allegheny v. Zimmerman*, 95 Pa. St. 287; *Stewart v. Strong*, 20 Ind. App. 44.

Our Supreme Court, in the case of *Wabash, etc., R. Co. v. Locke*, *supra*, say: "Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, can not be taken into account as a basis upon which to predicate a wrong."

It is said in Pollock on Torts, 36: "Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order

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his precaution by the measure of what appears likely in the known course of things.”

Taking the facts as stated in the complaint, it does not appear and it cannot reasonably be inferred that appellant failed to observe such precautions for appellee's safety as were reasonable and prudent under the circumstances.

In the case of *Wood v. Pennsylvania R. Co.*, 177 Pa. St. 306, 35 Atl. 699, 35 L. R. A. 199, it is said: “Again, the competent railroad engineer knows, from his own experience and that of others in like employment, that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing; he knows death and injury are the probable consequences of his neglect of duty, therefore he gives warning. But does any one believe the natural and probable consequence of standing fifty feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there, because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger; they feel as secure as if in their homes; to them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in *Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. St. 293, be chargeable with the consequence? Clearly it was not the natural and probable consequence of its neglect to give warning, and therefore was

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not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequence of the neglect to give warning. As is said in *Railroad Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627, 'Responsibility does not extend to every consequence which may possibly result from negligence.' What we have said thus far is on the assumption that the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he can not be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it."

We think the supreme court of Pennsylvania, in the above quoted case, correctly stated the law upon facts not materially different from the case at bar. It was error to overrule the demurrer to the complaint.

Judgment reversed, with instructions to the lower court to sustain appellant's demurrer to appellee's complaint.

THE HOLT ICE AND COLD STORAGE COMPANY v. THE
ARTHUR JORDAN COMPANY.

[No. 8,076. Filed May 29, 1900. Rehearing denied October 5, 1900.]

WAREHOUSEMEN.—*Damages. — Breach of Contract. — Complaint. — Contributory Negligence. — Bailment.*—A complaint against a cold storage company for damages to butter stored which defendant, for a reasonable storage charge, paid by plaintiff, undertook and agreed to keep frozen and preserved, but which by its negligence was permitted to become contaminated by deleterious odors greatly diminishing its value, shows an action *ex contractu*, and is not defective because of its failure to negative contributory negligence on the part of the plaintiff. pp. 316-320.

SAME.—*Damages to Butter in Storage.—Measure of Damages.—Negligence.*—In an action against a storage company for damages to butter from contamination by deleterious odors while in storage in

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defendant's warehouse under a contract of bailment, with no time fixed by the parties when the bailment should end, the measure of damages is the difference between the market value of the butter, at the time the bailment was ended by the parties, if it had been in good condition, and the market value thereof in its damaged condition at such time, although the butter was continued in storage after both parties knew that a part of it had become damaged. *pp. 320-328.*

WAREHOUSEMEN.—Damages.—Negligence.—Burden of Proof.—Instructions.—An instruction in an action for damages to goods while in storage, to the effect that when plaintiff has shown that the bailee received the property in good condition, and returned it damaged, he has made out a *prima facie* case of negligence, but if defendant did account for the injury to the property in any manner consistent with the exercise of ordinary care on its part then plaintiff, in order to recover, must show that the damage occurred through negligence, states the law correctly. *pp. 328-331.*

From the Marion Superior Court. *Affirmed.*

J. R. Wilson and *M. M. Townley*, for appellant.

R. W. McBride and *C. S. Denny*, for appellee.

ROBINSON, C. J.—Appellee's complaint avers that appellant is a warehouseman maintaining storage rooms for storing butter and other articles of a perishable nature; that appellee was engaged in buying butter which it wished to preserve for future use; "that said defendant undertook and agreed with plaintiff that for a reasonable storage charge it would cause said butter to be kept in frozen storage in its said rooms, and that thereafter, to wit, from time to time during the months of May, June, and July of 1897, plaintiff did deliver to defendant large quantities of said butter, in all, 21,072 pounds, to be by defendant thus kept in frozen storage, and agreed to pay to defendant its charges therefor, which said charges plaintiff thereafter paid; and that in consideration of plaintiff's said promise to pay said charges, said defendant accepted and kept in its said frozen storage rooms all of said butter, and undertook to use ordinary skill, diligence, and care in the storage and preservation thereof. Plaintiff further avers that said defendant wholly failed to use due, ordinary, and reasonable care, skill,

and diligence in the storage and preservation of said butter, by reason of which it became, and was, impregnated with deleterious odors and flavors, which greatly diminished its value, to wit, in the sum of \$5,000; all to plaintiff's damage in the sum of \$5,000, for which sum plaintiff demands judgment."

Appellant answered in general denial. Trial by jury and verdict for appellee for \$2,300. Appellant's motions for a new trial and in arrest were overruled. These rulings, and that the complaint does not state facts sufficient to constitute a cause of action, are assigned as error.

It is argued that the complaint is defective for failure to negative contributory negligence. If the recovery demanded is sought to be predicated upon the breach of a contract it was not necessary to aver the absence of contributory fault. It is insisted by appellant's counsel that the contract referred to in the complaint is purely as an inducement to what follows, and that the action is for damages arising out of a breach of duty imposed by law.

Although the code provides that there shall be but one form of action for the enforcement and protection of private rights and the redress of private wrongs, yet the courts have constantly kept in view the fundamental distinction between case and assumpsit. The distinction between actions *ex delicto* and actions *ex contractu* is as substantial and material under the code as before its adoption. The code may abolish the formal differences between such actions, yet the intrinsic and substantial differences remain as before. And where a party's contract rights have been violated by the wrongful and tortious act of another he may, as a general rule, sue for damages for the tort, or, waive the tort, and sue on contract. In such case, under the code and at common law, the party has the two concurrent remedies.

Where a pleader simply sets forth the facts of the transaction, it is often difficult to determine whether he has sued in tort, or waived the tort, and sued on contract, but in

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every case whether the action is *ex contractu* or *ex delicto* must be determined from the facts which are averred as constituting the cause of action, not from averments which are neither issuable nor material.

In 1 Chitty on Pl. (16th Am. ed.), 397, the author says that when the declaration "is founded on the obligation of law, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the defendant's particular duty or liability."

At common law a declaration in *assumpsit* must disclose the contract, its consideration, whether the contract was express or implied, and its breach. It was necessary to show a promise, either by directly averring that the defendant "promised", or by other equivalent words. *Avery v. Tyringham*, 3 Mass. 160; *Sexton v. Holmes*, 3 Munf. 566; *Cooke v. Simms*, 2 Call. (Va.) 39.

When pleadings were in Latin the word *assumpsit* was always inserted in the declaration as a description of the defendant's undertaking, and afterwards the word "undertook", though the promise be founded on a legal liability and would be implied in evidence, was always considered proper to be inserted in the declaration. Bacon's Abr., *Assumpsit*, F.; 1 Chitty on Pl. (16th Am. ed.), 152, 308, 397; 2 Chitty on Pl. (16th Am. ed.), 69, 144, 484; *Booth v. Farmers, etc., Bank*, 65 Barb. 457. For the difference at common law between the form of a declaration in *assumpsit* and one in case, see 2 Chitty on Pl. (16th Am. ed.), 60, 483.

In *Booth v. Farmers, etc., Bank*, *supra*, it is said: "When case and *assumpsit* were at common law concurrent remedies, the form of action that the pleader selected was determined, as I have shown by the insertion in or omission from the declaration of the allegation that the defendant undertook and promised. This right of selecting remedies, and whether the action is in *tort* or *assumpsit*, must be determined by the same criterion. If this is not so,

then the right of election is taken away. If taken away, which of the two is left? An action on contract can not be joined with one in tort. How are we to determine whether the action is one on contract or in tort, unless the pleader by averment alleges the making of the contract, and demands damages for a breach in the one case, or, by the omission of such an averment, makes it an action in tort? I know of no more certain or convenient criterion by which to determine the class to which a cause of action belongs than by the one suggested. If some such rule is not established the question of misjoinder will arise in every case in which, at common law, *assumpsit* and case were concurrent remedies."

While an express promise, or words equivalent to the averment of an express promise, was absolutely necessary in a declaration in *assumpsit*, yet, under the code, a promise need not be averred, if from the facts pleaded a promise would be implied by law. *Wills v. Wills*, 34 Ind. 106; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308.

In the case at bar the complaint shows an agreement under which appellant accepted for storage appellee's property, and for which appellee paid a consideration. The question is whether the complaint avers a promise, or facts implying a promise, to use diligence and care in the storage and preservation of the property. If there is such a promise, express or implied, it must be in the following: "And that in consideration of plaintiff's said promise to pay said charges, said defendant accepted and kept in its said frozen storage rooms all of said butter, and undertook to use ordinary skill, diligence and care in the storage and preservation thereof." The words quoted mean that in consideration of plaintiff's promise to pay the charges defendant accepted the butter and undertook to use skill and care in its preservation and storage. The neuter verb "undertake" sometimes means agree, promise. Soule's Synonyms; Century Dictionary. And taken with the context it is here

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used in the sense of agreed or promised. The complaint means appellant undertook to use skill and care in the storage and preservation of the butter in consideration of appellee's promise to pay the storage charges. A consideration is alleged, and it was for this consideration that appellant undertook to use skill and care. Taking the complaint as a whole its averments show that the pleader relied upon the agreement, and that the action is on contract. See *Staley v. Jameson*, 46 Ind. 159, 15 Am. Rep. 285; *Burns v. Barenfield*, 84 Ind. 43; *Lane v. Boicourt*, 128 Ind. 420, 25 Am. St. 442; *Greentree v. Rosenstock*, 61 N. Y. 583; *Austin v. Rawdon*, 44 N. Y. 63.

In *DeHart v. Haun*, 126 Ind. 378, the words used in the pleading could not be construed as a promise, for the reason no consideration was alleged.

In *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519, the complaint averred that the plaintiff having sustained a fracture employed certain physicians, who undertook, for a certain reward, to treat the fracture; that they executed their undertaking negligently, in consequence of which plaintiff was injured. The court said: "It might well be said within the holding in *Goble v. Dillon*, 86 Ind. 327, that the action was brought in form *ex delicto*, but we choose to put it on the broader ground, that regardless of the form in which the action is brought, since the injury for which a recovery is sought is an injury to the person, it can not survive the death of the defendant." And when the same case was appealed a second time, *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. 355, 7 L. R. A. 90, it was said: "If the action is, as doubtless it should be, regarded as a suit *quasi ex contractu*, for damages for an injury to the person occasioned by the breach of a joint contract, the death of one of the defendants simply severed the joint liability and extinguished the claim against the decedent, while it continued in full force as to the survivor."

It must be noted also that the word "undertook" is used differently in the Boor-Lowrey case from the case at bar.

In the former the physicians simply undertook to perform the service; in the case at bar appellant, for a consideration, agreed to perform the services and undertook to use care and skill. The same distinction is also to be noted in reference to the cases of *Hoopingarner v. Levy*, 77 Ind. 455, and *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308. In the case last mentioned the court said: "It is not alleged by whom the appellees were called upon and requested, or by whom they were to be paid a reasonable compensation, and if the allegation that 'they undertook the same', etc., can be said to be an averment of a promise, it is not stated to whom the promise was made." These observations clearly indicate that the complaint in that case was materially different from the complaint in the case at bar.

Having concluded that the complaint avers a contract to use skill and care in the storage and preservation of the property, the averment that appellant "wholly failed to use due, ordinary and reasonable care, skill and diligence in the storage and preservation of said butter, whereby it became" damaged, must be construed as an averment of the breach of the contract. The averments are that appellant contracted to do a certain thing, and that it failed to do it. The breach is pleaded as effectively as it would have been had the word itself been used. See *Lane v. Boicourt*, 128 Ind. 420, 25 Am. St. 442; *Coon v. Vaughn*, 64 Ind. 89.

As the action stated in the complaint is *ex contractu* an averment of the absence of contributory fault was unnecessary.

Complaint is made of the court's instruction concerning the measure of damages. That part of the instruction in question reads as follows: "If you find that the butter in controversy was in good condition when it was delivered to the defendant, and upon its return to the plaintiff it was found to be in a damaged condition from any act or omission of the defendant, then plaintiff's measure of damages would be the difference between the market value of the

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said butter in the city of Indianapolis at the time it was returned to the plaintiff, if it had been in good condition, and the market value at said time and place of said butter in its damaged condition. * * * If, however, you should find from the evidence that at any time while said butter was stored in the defendant's warehouse, defendant ascertained that the said butter was being damaged, and that it was likely to suffer further damage by remaining in said warehouse, and that upon ascertaining such fact the defendant informed plaintiff thereof, and requested and notified plaintiff to remove said butter from said warehouse, and which the plaintiff neglected and refused to do within a reasonable time thereafter, then the measure of plaintiff's damage would be the difference between the market value of said butter in the city of Indianapolis at the time plaintiff received such notice, if in good condition, and the market value of the same butter at the same time and place in its damaged condition, unless at the time of receiving such notice the state of the weather was such, or that by reason of plaintiff's having no other place in which to store said butter, the injury to the same at any time prior to the time it was removed would have been greater, in case it was then removed than it would be if it remained in defendant's warehouse, in which case the measure of damages would be as first above herein mentioned."

It appeared the butter was stored in a room opening on a hall, and that in other rooms opposite and opening on the same hall were stored oranges, lemons, and other fruits, the odors from which contaminated the butter. The butter, about 21,000 pounds, was placed in storage, beginning the latter part of May, through June and July. About 4,000 pounds were taken out in June, July, and August; and the balance, about 17,000 pounds, September 25, 1897.

The jury found as a fact, and there is evidence to that effect, that appellee first knew or learned that the butter,

or some of it, was contaminated by a foreign odor, July 23, 1897. Appellant requested an instruction, which was refused, to the effect that the measure of damages would be the difference between the market value of cold storage butter of the kind in controversy, and its market value in its damaged condition, at the actual time that the damage occurred; that if damaged in July it must be governed by the July price, and if it was injured in July or August and appellee knew that fact, that appellee could not, by keeping the butter in storage until a time when the market price was higher, thus enhance the damages recoverable.

The evidence shows a contract of bailment. The storage charges were three-sixteenths of a cent per pound for the first month and one-eighth of a cent per pound for each succeeding month. When entered into no time was fixed by the parties when the bailment should end. The storage charges were paid by appellee and accepted by appellant for storage up to October 1st. The butter was taken out of storage September 25th.

The paramount rule in assessing damages is that every person unjustly deprived of his rights should at least be fully compensated for the injury sustained. The question is as to the time when this compensation should be estimated. It is conceded that had the contract of bailment called for a delivery back on September 25th, that date would be taken in estimating the damages, because fixed by the contract itself. It must be conceded also that this bailment did not end until the property was removed from storage by the bailor, and when it was removed the bailment ended. The liability of appellant as bailee ended at that time. The acts and conduct of the parties at that time show that they then agreed that the bailment should then end. The parties themselves at that time fixed the termination of the bailment, and it was as effective as if, when entered into, the date for its termination had been fixed.

The contract made in May continued in force until September 25th, and was in force on that day. The contractual

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obligation assumed by appellant when it accepted the property was that it would exercise care in its preservation and that it would deliver it over to the bailor at the termination of the bailment. So far as concerned the care required of appellant during the bailment, it is immaterial whether the contract when made had a fixed or uncertain duration. The obligation to return the property in as good condition as when received, except it may have been injured without the bailee's fault, continued until the bailment should end. Without stopping to inquire in what manner appellant might have terminated the bailment, it did not terminate it, but voluntarily continued it in force until the property was removed by appellee. It must be conceded that appellant could perform its part of the contract only by delivering up the property in good condition when the bailment ended. Appellee, having complied with the contract, had the legal right to such performance, and default in that regard was a violation of that right. The measure of appellee's damages is whatever it will take to place him in as good condition as he would have been had the contract been fulfilled. The value should be fixed at the time when, by appellant's fault, the loss culminates. As is said in 1 Sutherland on Damages' (2nd ed.), §105: "The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due." See Hale on Bailments & Car., 78, 98, 253; Schouler on Bailments (3rd ed.), §§117, 159; Lawson on Bailments, §§20, 344; Story on Bailments (9th ed.), §§269, 414; *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755; *Hyde v. Mechanical, etc., Co.*, 144 Mass. 432, 11 N. E. 673; *Motley v. Southern, etc., Co.*, 122 N. C. 347, 30 S. E. 3; Hale on Damages, 185.

Although there was some evidence that odors were contaminating a part of the butter before the bailment ended, yet in legal contemplation appellee was injured when appellant failed to return the property in as good condition as

when stored. The fact that the market value of the property may have been greater or less at the termination of the bailment than at some time during the bailment has nothing to do with fixing the correct legal rule as to the measure of damages. The contract was from month to month. The record shows the contract of bailment was voluntarily continued by appellant after it knew a part of the butter was becoming contaminated. It had full control over the manner of storage and had it in its power to remove the contaminating influences.

In *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755, the court said: "The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others."

In *Motley v. Southern, etc., Co.*, 122 N. C. 347, 30 S. E. 8, tobacco was stored in October, 1894, for an indefinite period, and was returned to the owner June, 1895, in a damaged condition. It is not expressly stated when, but it is manifest from the opinion that the injury occurred sometime during the storage. The rule as to the measure of damages was held to be the difference between what the tobacco would have brought on the market at the place on the day it was delivered to the owner if it had not been damaged and what it would have brought on the same market on the same day in its damaged condition.

In actions for breach of a contract to deliver goods, the general rule is that the measure of damages is the difference

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between the contract price and the market value at the time and place fixed by the contract. *Rahm v. Deig*, 121 Ind. 283; *Vickery v. McCormick*, 117 Ind. 594. It is true, in such cases, the contract itself fixes the time for the ascertainment of damages. And so a common carrier must deliver goods within a reasonable time after transportation, and damages for failure to deliver are to be ascertained as of the date of delivery.

In the case of *Adams v. Sullivan*, 100 Ind. 8, cited by counsel for appellant as sustaining its view of the instruction in question, appellee placed with appellant eggs and butter in cold storage beginning June 8th, and ending September 5th, and when withdrawn from storage they were found to be damaged, for which suit was brought. The trial court instructed the jury: "The plaintiff is, however, entitled to recover the highest market price he could have obtained at the time of the injury for the goods, had the defendants fully performed their duty and properly preserved the goods during the time they were bound under their contract to keep them in storage." Upon appeal this instruction was disapproved, the court saying: "The jury ought to have been told that in assessing the damages, the eggs should have been estimated according to their market value in the city of Indianapolis, *when they were injured*. The rules for the assessment of damages in actions of trover, for breach of a contract to be performed at a particular place, and for injuries to goods *in transitu* by common carriers, concurrently sustain us in the conclusion we have reached, adverse to the correctness of the instruction set out in part as above. Besides, when the market is fluctuating and the precise time somewhat indefinite, the average range of prices about the time inquired of affords the proper standard of the market value of a commodity."

Whether the expression "when they were injured" should read "where they were injured", and an examination of the original manuscript opinion as written leaves the question

in some doubt, we think it unnecessary to inquire, because the instruction was held erroneous for estimating the damages at the highest market price which might have been obtained for the eggs in any market. There seems to have been no controversy in the case about the time when the damages should be estimated. There is no question in the case about any injury prior to the time the eggs were withdrawn from storage. Obviously the damages were estimated as of the time they were withdrawn from storage, that is, when the bailment ended. It would seem from the opinion that the clause mentioned could have been omitted, so far as the effect then given it is concerned, as the statement is made that the rule for the assessment of damages for injuries to goods *in transitu* by carriers sustains the court in the rule announced; and it is well settled that damages for injuries to goods *in transitu* are not determined as of the time and place when and where injured, but they are to be ascertained as of the date of delivery. It is not intended to criticise in any way the case of *Adams v. Sullivan*, 100 Ind. 8, but taking the question at issue in that case and the opinion as a whole we do not think we have declared a rule in the case at bar at variance with the holding in that case.

The general rule is that in an action of trover the measure of damages is the value of the property at the time of the conversion. But the time of conversion is not always fixed by the same circumstances. So long as the wrongdoer retains the property in kind the owner may recover it. He may sue in replevin for the recovery of the specific property, or he may sue in trover for damages for the value of the property. If he sues for damages, a demand does not necessarily fix the time of conversion, but a demand and refusal are sufficient evidence of it. Even though the form of the property has been changed and its value increased it may be recovered in its changed form. Likewise its increased value may be recovered. An examination of the authorities will disclose that while the general rule is that the measure

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of damages is the value of the property at the time of the conversion, it is not a universal rule. Thus in a suit for the value of logs appropriated by a defendant who had cut and hauled them to his mill about five miles distant, the measure of damages was held to be the value of the lumber in the logs at the mill at the time they were there converted, and not the value of the logs when severed from the freehold. *Everson v. Seller*, 105 Ind. 266, 5 Am. Rep. 189. See *Final v. Backus*, 18 Mich. 218. And in *Ellis v. Wire*, 33 Ind. 127, defendant took possession of wheat standing in the field, and afterwards harvested and sold the grain, and in a suit for conversion it was held the owner was entitled to the highest price of the property at any time between the taking and the sale. In *Citizens St. R. Co. v. Robbins*, 144 Ind. 671, it was held that the measure of damages for the conversion of railroad stocks is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock, and in that case the date of the demand for the stock was fixed as the date of the technical conversion and the value of the stock was fixed as of that date. In *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. ed. 854, the conversion was held to have occurred when there was a refusal to comply with a demand. See *Vaughan v. Webster*, 5 Harr. (Del.) 256. In *Bank v. Boyd*, 44 Md. 47, suit for damages for the loss of bonds, the measure of damages was the market value of the bonds when lost.

It will be seen from an examination of the above cases that a demand and refusal are evidence of a conversion, but that they do not fix the time of conversion, and that while the damages are fixed as of the time of the conversion, they may be fixed without reference to the time of any demand by the owner.

It can not be said the instructions give appellee damages that might have been avoided. The butter was continued

in storage after both parties knew a part of it had become damaged. It was a matter of contract. Appellant could not have terminated the bailment by taking advantage of its own wrong. If the instruction is open to objection in this respect it is not an objection appellant can make. Appellee left the butter in storage under a contract. The rights of the parties to the contract were not affected by the fact that the market price of butter rose. There is no reason for supposing that this rise disturbed the ratio previously existing between the value of good and damaged butter. The rise would naturally affect both. See *The Ship Compta*, 5 Saw. (U. S.) 137; *Gibbs v. Gildersleeve*, 26 U. C. Q. B. 471.

Upon the question of contributory negligence, appellant's counsel say that if appellee, at the time of the storage, knew exactly the circumstances under which the butter would be stored and knew that the result would be that the butter would be injured if so stored, there could be no recovery. This is true, but the record does not present such a case. The jury answered that appellee's officers visited the warehouse before making the contract of storage, but the jury also found, and there is evidence to support the finding, that appellee's officers were not acquainted with the method of storage used by appellant company.

It is also argued that the court erred in its instruction concerning the burden of proof. This instruction reads: "While I have already instructed you that the general rule is that the burden is on the plaintiff to prove the material allegations of his complaint, such rule in a case of bailment such as this is subject to the following modification, that is, where the bailor seeks to recover from a warehouseman for an injury to goods stored with such warehouseman, the bailor must prove negligence on the part of the warehouseman. But when the bailor shows that the goods were in good condition when delivered to the bailee, and that when returned they were in a damaged condition from any cause not inherent in the goods themselves, the plaintiff has made a *prima facie* case, and the burden then shifts to and is on

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the warehouseman to account for the injury to the goods in some manner consistent with the exercise of ordinary care on his part, and if the warehouseman fails so to account for the injury he would be liable for such injury. But if the warehouseman does account for the injury to the goods in any manner consistent with the exercise of ordinary care on his part, then in order to recover, the bailor must prove positive negligence occasioning the loss."

It seems the exact question presented by this instruction has not been decided in this State. Among the decisions in other jurisdictions there is a lack of uniformity. The general rule in negligence cases is that the complaining party must aver and prove negligence, and in a line of decisions this rule has been applied to a suit on a bailment contract, holding that as the case is founded on negligence the burden of proving it affirmatively rests throughout on the plaintiff. But the better reason underlies the doctrine, and it is supported by the weight of modern authority, that when a plaintiff has shown that the bailee received the property in good condition and failed to return it or returned it damaged, he has made out a *prima facie* case of negligence. An essential part of every bailment contract is the obligation to deliver over the property at the termination of the bailment. The bailor must prove the contract, the delivery of the goods to the bailee, and their return in a damaged condition. When he has done this the inference is deducible that the bailee is at fault and must answer, and especially is this true if the loss could not ordinarily have occurred without negligence. His failure to return the goods as delivered to him is inconsistent with what he agreed to do. The property was in his possession, under his care and oversight and away from that of the bailor, who, in most cases, could not know under what circumstances it was damaged. Generally speaking the *onus probandi* is upon the party who has to free himself from liability by proof of facts the knowledge of which is peculiarly within his own power rather than of his adversary.

Strictly speaking perhaps there is no shifting of the burden of proof in such cases, though usually thus characterized. The plaintiff must make a *prima facie* case of negligence, and he has at all times the burden of proving facts to make this case. As is said in Hale on Bailments, p. 30: "The better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that when the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it badly injured, he has made out a *prima facie* case of negligence. When he has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* rests upon defendant to prove that the injury was caused without his fault." Hale on Bailments, pp. 30, 241; Schouler on Bailments, (3rd ed.) §23, n. 1; Story on Bailments (9th ed.), §410, n. 3, §411; Edwards on Bailments (2nd ed.), §§399, 400; Lawson on Bailments, §332; Jones' Law of Evidence, §184; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189; *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272, 9 Am. Rep. 347; *Collins v. Bennett*, 46 N. Y. 490; *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725; *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660; *Vaughan v. Webster*, 5 Harr. (Del.) 256; *Funkhouser v. Wagoner*, 62 Ill. 59; *Higman v. Camody*, 112 Ala. 267, 20 South. 480, 57 Am. St. 33; *Ford v. Simmons*, 13 La. Ann. 397; *Haas v. Taylor*, 80 Ala. 459, 2 South. 633; *Goodfellow v. Meegan*, 32 Mo. 280; *Wiser v. Chesley*, 53 Mo. 547; *Thompson v. St. Louis, etc., Co.*, 59 Mo. App. 37; *Hildebrand v. Carrol* (Wis.), 82 N. W. 145; *Schmidt v. Blood*, 24 Am. Dec. 143, 150, note. *Parry v. Squair*, 79 Ill. App. 324. See, also, *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Malaney v. Taft*, 60 Vt.

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571, 15 Atl. 326; *Leidy v. Quaker City, etc., Co.*, 180 Pa. St. 323, 36 Atl. 851.

In some of the above cases the action was against the bailee for failure to deliver over the goods, and in others for delivering them over in a damaged condition, but the rule above stated is applied to both classes of cases alike. We can not agree with appellant's counsel that the case of *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633, declares a different rule. In that case suit was brought against wharfingers for the loss of a box of goods, and it was held that it devolved upon the wharfingers to show the box out of their possession. This certainly means out of their possession in some manner consistent with due care on their part. There was no evidence that the box had passed from the defendant's possession, and the court held that fact must be shown by the wharfingers, and, when shown, the plaintiff, to recover, must show the loss occurred for want of due care on defendant's part. And so in the case at bar the jury were in effect told that if appellant did account for the injury to the property in any manner consistent with the exercise of ordinary care on its part then appellee, to recover, must show the damage occurred through negligence. The instruction in question stated the rule based upon the better reasoning, and supported by the weight of modern authority.

Judgment affirmed.

CLINE v. THE STATE.

[No. 8,442. Filed October 9, 1900.]

TRIAL.—*Improper Question Propounded by Judge.—Harmless Error.*

—Where the defendant who is a witness in his own behalf answers an improper question asked by his own attorney, it is not reversible error for the trial judge to propound to the witness a question in line with the one previously asked by such attorney. *p. 333.*

CRIMINAL LAW.—*Appeal from Justice of the Peace.—Arraignment.*—

Where a defendant has pleaded not guilty to a criminal charge before a justice of the peace, no other plea is required on appeal to the circuit or criminal court. *p. 334.*

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CRIMINAL LAW.—*Appeal from Justice of the Peace.—Arraignment.—*

Where one charged with a misdemeanor before a justice of the peace was tried and convicted upon a plea of not guilty, and thereafter appealed to the circuit court, the entertainment of a motion in the latter court to quash the affidavit does not operate as a withdrawal of the plea. *pp. 334, 335.*

JUSTICES OF THE PEACE.—*Correction of Transcript After Appeal.—*

Clerical errors in a transcript on appeal from a judgment of a justice of the peace may be corrected by the justice after appeal. *p. 335.*

From the Delaware Circuit Court. *Affirmed.*

P. D. Smith, for appellant.

W. L. Taylor, Attorney-General, *E. M. White*, *Merrill Moores* and *C. C. Hadley*, for State.

WILEY, J.—Appellant was prosecuted and convicted before a justice of the peace for an assault and battery upon the person of one Catharine McDonald. From this judgment he appealed to the court below. Upon being arraigned before the justice of the peace, he entered a plea of not guilty. In the circuit court, without withdrawing his plea of not guilty, or without asking permission of the court to withdraw it, he moved to quash the affidavit. This motion was overruled, and without further plea he was put upon his trial before a jury, and was found guilty. His motion for a new trial was overruled, and a judgment of conviction was entered.

Overruling appellant's motion for a new trial is the only error assigned. But two questions are discussed by appellant's counsel: (1) Error of the court in propounding to appellant, when testifying in his own behalf, a certain question, and in requiring him to answer it, and (2) in permitting the justice of the peace before whom the case originated, and was tried, to amend the transcript certified by him, to show that on being arraigned appellant entered a plea of not guilty.

Appellant was manager of a corporation engaged in selling house furnishing goods, etc., on the instalment plan, and which had sold some goods to the prosecuting witness. His

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defense rested upon the ground that the prosecuting witness had defaulted in making her payments, and that by reason of which, under the terms of the contract of sale, the vendor was entitled to take possession of the goods. It was for this purpose that appellant, in company with two other persons, went to the home of the prosecuting witness on the occasion when it is alleged that the assault and battery was committed.

Appellant was a witness in his own behalf, and in his examination in chief his counsel asked this question. "Mr. Cline * * * you may tell the jury what you knew or heard of Mrs. McDonald being a quarrelsome or fighting woman prior to the day you went out there to retake this property?" To which he made the answer: "Well, one of my collectors told me that she said that we could not get the goods and that she would break anybody's head that come there after them. That was one thing." Thereupon, and immediately following this question and answer, the court asked the witness this question: "Then you had notice that they would not give you peaceable possession of the goods when you went there?" To which he replied: "She had told the collector that."

Appellant's counsel objected to the question, but did not state any grounds of objection. While it is not one of the duties of a trial judge to interrogate a witness, it is certainly his right and province to do so if he does it within due bounds and without violating the rules of evidence. The question propounded to the appellant by the trial judge, and of which complaint is made, was certainly as proper and pertinent an inquiry as that which immediately preceded it, for it was directly in line with it. The question asked by the judge and the response to it was but an elaboration of the subject-matter, to which appellant's own counsel had just called his attention by the question addressed to him and his response to it. Waiving the fact that counsel did not state the ground of his objection to the question, we are

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clear that the trial judge did not transcend his authority in asking it, and that there was no error in his so doing.

Counsel next urge that the motion to quash the affidavit in the circuit court and the entertainment of the motion operated as a withdrawal of the plea of not guilty before the justice of the peace, and that as the motion was overruled, it was necessary for the appellant to plead again. It is upon this proposition that it is argued that the trial proceeded without a plea, and therefore the verdict was contrary to law. In support of this, our attention is called to the case of *Mentor v. People*, 30 Mich. 91; but the rule is different in this State. *Laycock v. State*, 136 Ind. 217.

A defendant in a criminal case might ask leave to withdraw his plea for the purpose of moving to quash the indictment or affidavit, pending his plea. The fact that he moves to quash without asking leave to withdraw, and without the court's granting such leave, can not be regarded as a withdrawal of his plea. In a prosecution before a justice of the peace, where the defendant pleads to the affidavit, in case of an appeal to the circuit or criminal court, no other plea is required. *Johns v. State*, 104 Ind. 557; *Weir v. State*, 115 Ind. 210.

If the record before us was silent on the question as to whether or not the appellant entered a plea of not guilty before the justice of the peace, it would not be a valid cause for reversal.

In the case of *Weir v. State*, *supra*, which originated before a justice of the peace, it was contended that the judgment should be reversed because the record did not affirmatively show that the appellant was arraigned in either the justice's or circuit court, or that a plea was entered in either court. It was held that it was not necessary in a prosecution originating before a justice of the peace that the record on appeal should affirmatively show the defendant was arraigned and that a plea was entered, either before the justice or in the circuit court. But here we have a record which

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affirmatively shows that appellant was duly arraigned before the justice and entered a plea of not guilty, and though the justice's transcript was amended by him after the return of the verdict, by permission of the court, we are unable to see how appellant was prejudiced thereby. Clerical errors in a transcript on appeal from a judgment of a justice of the peace may be corrected by the justice after appeal. *Baker v. Chambers*, 18 Ind. 222, and authorities there cited. As there is no showing to the contrary, we presume that the correction to the transcript was made to correct a clerical error, so that the record might speak the truth. There does not seem to be any merit in appellant's contention.

Judgment affirmed.

THE KOKOMO CITY STREET RAILWAY COMPANY v. THE
PITTSBURGH, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.

[No. 8,124. Filed October 10, 1900.]

PLEADING.—Abatement.—Filing of Plea After Cause at Issue.—Under §403 Burns 1894, a plea in abatement may properly be filed after the cause is at issue, where the cause for abatement did not arise sooner. *p. 336.*

ABATEMENT.—Refusal of Receiver to Continue Action Against Corporation.—The refusal of a receiver of a corporation to continue an action previously brought by such corporation may be pleaded in abatement. *pp. 336-339.*

From the Howard Circuit Court. *Affirmed.*

L. J. Kirkpatrick, J. F. Morrison, T. C. McReynolds, B. C. Moon and C. Wolf, for appellant.

J. L. Rupe, M. Bell and W. C. Purdum, for appellee.

HENLEY, J.—This appeal is by the plaintiff below. It is assigned as error (1) that the court erred in granting appellee leave to file a supplemental plea in abatement; (2) that the court erred in overruling appellant's demurrer to appellee's plea in abatement. The question presented by

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the record arises upon the following facts: Appellant, a corporation owning and operating a street railway in the city of Kokomo, commenced this action in the Howard Circuit Court for damages resulting from a collision of one of its cars with one of appellee's trains at the crossing of the tracks of the two roads in said city. While the cause was pending, and between the time the cause was put at issue and the time it was set for trial, the appellant corporation had in an action brought against it in said Howard Circuit Court been adjudged insolvent, and the court had appointed a receiver of all its property and assets, and such receiver had accepted the trust, had qualified, and was proceeding with the settlement of said trust under the order and directions of said court, when this cause was called for trial. Thereupon counsel for appellee asked and obtained permission of the court to file a plea in abatement in which the attention of the court was called to the facts as heretofore set out, and denying the right of appellant further to prosecute the action.

It is first insisted that the court erred in permitting the plea in abatement to be filed after the cause was at issue, and contrary to a rule of the Howard Circuit Court. There was no error in permitting the plea. The cause for abatement arose after the action was brought, and after the issues were closed. These facts appear in the plea. It was a supplemental defense and could be pleaded by leave of court. §402 Burns 1894.

We come now to the second error claimed by appellant, the overruling of the demurrer to the plea in abatement.

We think it well settled that the appointment of a receiver for a corporation does not stop or affect a suit that is pending against the corporation. If the receiver becomes a party defendant, it is upon his own motion, as it does not matter to the plaintiff in such an action whether his judgment be against the corporation or its receiver. Cook on Corp., §871. This being a receivership *pendente lite*, and

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not for the purpose of winding up the corporation, the powers of the receiver are confined to those conferred upon him by the statute under which he was appointed and by the order of the court appointing him. The receiver in this instance was appointed to take charge of the affairs of an insolvent corporation upon the petition of the creditors. His authority extended over all the assets of the corporation of whatever nature. It was the necessary effect of the appointment of a receiver that all rights of action of whatever description be suspended upon the part of the corporation. Under the order and direction of the court, the receiver became the representative not of the creditors alone, but of the corporation and stockholders as well. It became his duty to collect all just claims due the corporation. If the order appointing him did not authorize him to prosecute the action against appellee, it became his duty, if the action was a meritorious one, to obtain the permission of the court so to do. If the receiver failed to do this, if in any way he neglected his duty, to the damage of the trust, an action would lie against him in favor of the injured parties.

In Thompson's Law of Corporations, Vol. 5, §6,900, it is said: "The necessary effect of the appointment of receiver, unless the statute under which he is appointed, or the order appointing him, is restrictive, is to suspend all rights of action, of whatever description, on the part of the corporation; since the receiver, in a general receivership, whether it be what is called a receivership *pendente lite*, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation of whatever description, for the purposes of the administration; and this necessarily includes every right of action of whatever description which is possessed by the corporation."

The action of the court in appointing a receiver for appellant corporation suspended appellant's right further to

prosecute the claim against appellee. Under the order of the court, as the servant of the court and the representative of the corporation and of the creditors, the receiver could continue the action, dismiss or compromise it. Whatever claim appellant corporation had against appellee became an asset in the hands of the receiver, to be administered by him under the directions of the court appointing him. This action being wholly within the control of the receiver under the orders of the court, and the facts alleged in the plea in abatement being all within the knowledge of the court, we very much doubt if the plea in abatement filed was necessary. We think the court could have ordered the action dismissed, or could have ordered the receiver to prosecute it to final judgment. And this, we think, is the only reasonable view to take. The assets of the corporation can not be controlled by the corporation and at the same time by the receiver. The very purpose of the action by the creditors to secure the appointment of a receiver was to take from the control of the corporation its assets, to prevent them from being wasted, and perhaps to secure a better management of the corporation's business. It would be absurd to hold that the insolvent corporation could, after the appointment of a receiver, continue to incur indebtedness for which the trust estate would be liable, without some action by the receiver with the approval of the court.

The cases cited by appellant are not in point here. They are all to the effect that the action may be continued by the receiver in the name of the corporation. This is statutory. §272 Burns 1894. In this case the receiver refused to continue the action, and the plea in abatement simply brought to the attention of the court those facts, which, with the consent of the court, permitted the receiver to discontinue the prosecution of the claim which his appointment as receiver placed in his control.

Counsel's objection to the plea in abatement, that it does not show that appellant was the owner of the claim sued on

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when the receiver was appointed, is not well taken. Conceding, without deciding, that this was a necessary allegation, still we think this fact is shown. It is alleged in the answer that appellant without the consent of the receiver is undertaking to prosecute this action for its use and benefit. This is a sufficient allegation to show that appellant was the owner of the claim at the time the plea in abatement was filed, which was long after the appointment of the receiver.

We find no reversible error. Judgment affirmed.

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[No. 3,409. Filed October 10, 1900.]

APPEAL AND ERROR.—*Assignments of Errors.*—*New Trial.*—Errors in the giving and in the refusal to give instructions, and in the admission and rejection of evidence cannot be presented for review on appeal by independent assignments of error. Such questions must be assigned as causes in a motion for a new trial. *p. 339.*

SAME.—*Bill of Exceptions.*—*Evidence.*—*Review.*—Where a bill of exceptions shows upon its face that it does not contain all the evidence, the Appellate Court will not consider any question which depends for its proper decision upon the evidence, although the bill states that it contains all the evidence. *p. 340.*

BASTARDY.—*Amount of Judgment.*—*Discretion of Court.*—The amount of judgment in a bastardy proceeding is largely in the discretion of the court and will not be disturbed on appeal unless it is shown that the judge has abused his discretion. *p. 340.*

From the Greene Circuit Court. *Affirmed.*

T. Van Buskirk and *W. L. Slinkard*, for appellant.

H. W. Moore and *C. E. Davis*, for appellee.

ROBINSON, C. J.—The giving of instructions, and the refusal to give those requested, can not be presented for review on appeal by independent assignments of error. Nor can the admission or rejection of evidence be thus presented. Such questions must be assigned as causes in a motion for a new trial. *Cromer v. State*, 21 Ind. App. 502; *Baecher v. State*, 19 Ind. App. 100; *Kernodle v. Gibson*, 114 Ind. 451; *Indiana, etc., Co. v. Wagner*, 138 Ind. 658.

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The bill of exceptions containing the evidence states that it contains all the evidence given in the cause. Following the direct examination of each of five witnesses called by appellant is the statement, "and said witness testified on cross-examination as follows, to wit." No evidence follows these several statements. If no evidence was in fact given, these statements should have been omitted. From them we must conclude that these witnesses did testify on cross-examination. As this evidence is not in the bill, it thus shows upon its face that there was evidence given which it does not contain. It has been uniformly held that although the bill states that it contains all the evidence, if it shows upon its face that it does not, the court will not consider any question which depends for its proper decision upon the evidence. *Collins v. Collins*, 100 Ind. 266; *Eichel v. Bower*, 2 Ind. App. 84; *Evansville, etc., R. Co. v. Kendall*, 4 Ind. App. 460; *Lawrenceburg, etc., Co. v. Hinke*, 119 Ind. 47; *Shimer v. Butler University*, 87 Ind. 218; *Morris v. Stern*, 80 Ind. 227; *Clay v. Clark*, 76 Ind. 161; *French v. State*, 81 Ind. 151; *Hammon v. Sexton*, 69 Ind. 37; *Brownlee v. Hare*, 64 Ind. 311; *Felbenzer v. Van Valzah*, 95 Ind. 128.

The reasons for a new trial all depend upon the evidence given at the trial. All the questions discussed by counsel could be determined only from a consideration of all the evidence. As the record shows upon its face that there was evidence given on the trial which it does not contain, we must treat the record as not containing the evidence. In overruling the motion for a new trial the court had all the evidence before it, and, in the absence of the evidence here, we must presume in favor of the action of the court.

The verdict of the jury was returned on the 22nd day of the term. On the 28th day of the term the attorneys for the State and for appellant agreed in open court that they would "take up this cause" on the 30th day of the term, and on that date the court heard evidence on the amount of

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the judgment. In bastardy proceedings the court may hear evidence bearing especially upon the amount of the judgment. The amount to be fixed is largely within the court's discretion and is to be determined from the facts proved upon the trial and all the circumstances surrounding the case. There is nothing in the record to show that there was any abuse of this discretion. See *Goodwine v. State*, 5 Ind. App. 63.

Judgment affirmed.

COOPER ET AL. v. MERCHANTS' AND MUNUFACTURERS'
NATIONAL BANK.

[No. 8,141. Filed June 7, 1900. Rehearing denied October 10, 1900.]

PLEADING.—Bills and Notes.—A complaint in an action on a promissory note is not defective in that it fails to refer to and identify the note, where the note is contained in the body of the complaint. *p. 343.*

SAME.—Anticipating Defense.—Bills and Notes.—A complaint in an action on a promissory note alleging the execution of the note, its purchase by plaintiff, before maturity, for a valuable consideration, in the usual course of business, without notice of any defense, does not contain an anticipated defense. *pp. 343, 344.*

BILLS AND NOTES.—Negotiable Instruments.—Instalments of Interest Due and Unpaid.—A note, negotiable under the law merchant does not lose its negotiability by instalments of interest thereon remaining due and unpaid. *pp. 344, 345.*

SAME.—Signatures.—Agreement.—Delivery.—Evidence in an action on a promissory note that the note was delivered to the agent of the payee under an agreement that the note should not be delivered until signed by another person, is inadmissible, since delivery to the agent passed the title to the payee. *pp. 345, 346.*

SAME.—Evidence.—Good Faith of Purchaser.—Although a note does not lose its negotiability by instalments of interest thereon remaining due and unpaid, evidence that the purchaser of a note bought it with knowledge that two annual instalments of interest were due thereon, was admissible on the question of the good faith of the purchaser. *p. 346.*

EVIDENCE.—Hearsay.—Bills and Notes.—Evidence by a bank cashier in an action on a promissory note purchased by the bank, that the bank nor any of its officers had any knowledge of any defense to the note was hearsay, and inadmissible. *pp. 347, 348.*

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TRIAL.—*Directing Verdict.*—*Bills and Notes.*—*Good Faith Purchaser.*

—*Notice of Defenses.*—The court erred in directing a verdict for plaintiff in an action by an indorsee upon a promissory note, where the maker claimed an equitable defense thereto, and notice to the indorsee thereof, and there was evidence that the indorsee knew that there were instalments of interest due and unpaid at the time the note was purchased. Henley, J., dissenting. pp. 348, 349.

From the Clay Circuit Court. *Reversed.*

H. H. Mathias and *S. A. Hays*, for appellants.

H. C. Lewis, *B. F. Corwin*, *S. D. Coffey* and *A. I. Vorys*, for appellee.

COMSTOCK, J.—This suit was founded on a promissory note payable at a bank in this State, alleged to have been executed by one Neil to McLaughlin Bros., and by the latter indorsed to the appellee.

The complaint, consisting of one paragraph, was originally filed in the Putnam Circuit Court. Upon change of venue, the cause was put at issue and tried in the Clay Circuit Court. A trial by jury resulted in a verdict and judgment in favor of appellee for \$1,275.83.

The first and second specifications of error question the sufficiency of the complaint. The third and fourth, the action of the court in sustaining the demurrers of appellee to the third and sixth paragraphs, respectively, of appellant's answer. The fifth, the action of the court in sustaining the motion of appellee requesting the court to direct the jury to return a verdict in its favor and in instructing the jury to return a verdict for the appellee against appellants for the full amount of the note in suit with interest thereon at the rate of six per centum per annum from the date of said note. This is also made a reason for a new trial. The sixth, the action of the court in overruling appellant's motion for a new trial.

In support of the first and second specifications of error (the insufficiency of the complaint), it is urged (1) that the complaint anticipates the defenses, but does not aver

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sufficient facts to avoid them. (2) That it does not sufficiently refer to and identify the note in suit, and neither the original nor a copy thereof is filed with the pleading. It does not contain any averment of a promise to pay, or when the note matured or where it was payable, or whether it bore interest and at what rate and when payable, and no direct or equivalent averment that the note remained unpaid. A reading of the complaint shows that these objections are not well taken.

The complaint avers that "the plaintiff is now the owner and holder of said note, which note and the indorsement thereon is in the words and figures following, to wit: '\$1,000. Greencastle, Ind., March 15, '94. On July 1, 1897, after date for value received, we jointly and severally promise to pay McLaughlin Bros. or order \$1,000 at the First National Bank of Greencastle, Ind., with interest at six per cent. per annum, interest payable annually.'" The names of appellants are set out. Indorsed "McLaughlin Bros."

It appears that the note with the indorsement is contained in the body of the pleading. This is sufficient. *Adams v. Dale*, 29 Ind. 273; *Jones v. Parks*, 78 Ind. 537. The note thus made a part of the complaint contains the promise to pay, the date of maturity, where payable, the rate of interest and where payable. Nor can we agree with counsel in the view that the complaint anticipates the defense. It avers the execution of the note, and its purchase before maturity for a valuable consideration by appellees without notice of any defense. The averments which counsel for appellant claim are designed to supply the place of a reply, and to protect the holder against any defense which the makers might have against the payees, are the following: "Which note was afterwards for a valuable consideration indorsed by said McLaughlin Bros. and for a valuable consideration sold, delivered, and transferred, in the usual course of business, to the plaintiff before the same became

due; that plaintiff purchased said note in good faith from the said McLaughlin Bros. before same became due, and for a valuable consideration, to wit, \$1,100, which it then and there paid in cash without any notice whatever of any defenses of the same at law or in equity; that said First National Bank of Greencastle, Indiana, is and was at the date of said note a bank in the State of Indiana, and that the plaintiff is now the owner and holder of said note."

In these averments no attempt is made to set up a defense to the note. *Latta v. Miller*, 109 Ind. 302 is cited. We are unable to see that it sustains appellants' claim. The complaint is upon a promissory note; it attempted to anticipate the defense, which was a written release of the maker, and then attempted to plead facts to avoid the release. In the course of the opinion the court, at p. 307, say: "It is true, no doubt, as appellant's counsel insist, that where the complaint or paragraph thereof, after stating the plaintiff's cause of action, sets up an anticipated defense thereto, and then attempts to avoid or defeat such defense by the statement of alleged facts in relation thereto, if the facts thus stated are not sufficient to avoid or defeat such anticipated defense, the complaint or paragraph thereof must be held bad on demurrer thereto for the want of facts. This must be so, in the nature of things, because the anticipated defense, if not avoided, constitutes a complete bar to the cause of action stated in the complaint or paragraph thereof." The complaint before us contains no averment of any defense, nor that the makers claimed to have any defense.

The action of the trial court in sustaining appellee's demurrers to the third and sixth paragraphs of answer are next discussed. The third paragraph avers that the note in suit was signed by appellants under an agreement with the payees that it was to be signed by certain other persons named, and that those persons failed to sign it. The sixth paragraph alleges that appellants were induced to sign the note by certain false and fraudulent representations made

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to them by the agent of the payees. In each it is alleged that three annual instalments of interest on the note were due and unpaid at the time of the indorsement of the note to appellee. Counsel for appellants, admitting that the note in suit was originally negotiable under the law merchant, yet claim that it was dishonored at the time of its purchase by appellees because annual instalments of interest were then due and unpaid. The argument in support of the third and fourth specifications of error is based upon this proposition. In the recent case of *Cooper v. Hocking Valley Nat. Bank*, 21 Ind. App. 358, 69 Am. St. 365, this court held adversely to the claim of appellants, giving the following citations: 1 Daniel Neg. Inst., §787; *National, etc., Bank v. Kirby*, 108 Mass. 497; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; and in addition, we cite: *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. ed. 554; *Boss v. Hewitt*, 15 Wis. 285; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. ed. 681. To the opinion expressed in *Cooper v. Hocking Valley Nat. Bank*, *supra*, we still adhere as supported by the weight of authorities.

In discussing the action of the court in overruling appellant's motion for a new trial, counsel for appellant claim that the court erred in striking out of the deposition of Robert McLaughlin questions numbered 49, 50, 52, 54, 66, 67, 68, 69, and 70 of his cross-examination. This witness had testified in his examination in chief that as agent of his sons, McLaughlin Bros., payees of the note in suit, he assisted in negotiating the sale of the horse for which the note was given, and took the notes which appellants gave in settlement for the horse. The questions which were stricken out relate to an agreement claimed by appellants and the agent of the payees, that the notes were to be signed by some other person and were placed in the hands of such agent to be delivered to the payee upon the happening of certain conditions. In this action of the court there was no

error. *Clanin v. Esterly, etc., Co.*, 118 Ind. 372, 3 L. R. A. 863. The delivery to the agent of the paper passed title to the payees. *Murray v. Kimball Co.*, 10 Ind. App. 141.

The second reason assigned for a new trial is that the court erred in sustaining appellee's motion to strike out of the deposition of Howard C. Park questions numbered four, five, and six and the answers thereto of his cross-examination. These questions are as follows: "How many annual instalments of interest were due on the note at the time of this transfer to the plaintiff? A. There were two instalments. Q. 5. Did you understand at the time that the note was transferred to the bank that two annual instalments of interest were overdue and unpaid on the note? A. I must have noticed it since there was no indorsement of interest on the note. Q. 6. You bought the note then, with the understanding that two annual instalments of interest were due thereon? A. I bought it with the knowledge that two annual instalments were due." It appears from the examination in chief of this witness that he was cashier of the appellee; that as such cashier he purchased the note for appellee; that no other officer of the bank had anything to do with the purchase.

In *National, etc., Bank v. Kirby*, 108 Mass. 497, the court said: "The fact that a promissory note, the principal of which is payable in four years with interest annually, bears no indorsement of the receipt of either of three instalments of interest which have fallen due, does not of itself render the note subject, in the hands of a third person who then took it as collateral security, to equities existing between the original parties to it; but is a circumstance for the consideration of the jury, on the issue whether he took it in good faith and without notice of such defenses." See, also, *Parsons v. Jackson*, 99 U. S. 434, 25 L. ed. 457; 2 Daniel's Neg. Inst. 1506a. This was proper evidence to go to the jury upon the question of good faith, and the court erred in striking it out.

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The third reason for a new trial is that the court erred in overruling appellants' motion to strike out of the deposition of said Park questions 21, 22, 24, 25, and 26, and the answers thereto, of the examination in chief of said witness. Said questions and answers are as follows: "Q. 21. On the 19th day of April, at the same time you say you purchased the note and afterwards in the month of May and up to the time that you said this money was all checked out of your bank and up to the maturity of this note, July 1, 1897, had you any notice or knowledge of any defense, legal or equitable, to this note? A. I had not. Q. 22. On April 19, 1897, or before that time, or on July 1, 1897, or before that time, had you any notice or knowledge that this note had been handed to any agent of McLaughlin Bros., by the makers of the note under an agreement that it should be signed by other persons before it should be delivered to Messrs. McLaughlin Bros., or before it should be an effective note? A. I had not. Q. 24. What notice or knowledge, if any, before July 1, 1897, did the plaintiff, The Merchants' and Manufacturers' National Bank, or any other officer of it, have of any defense, legal or equitable, to this note? A. Had no notice. Q. 25. Did any other officer of the bank have anything to do with the purchase of this note from McLaughlin Bros., besides yourself? A. They had not. Q. 26. Did you send this note to Greencastle, Indiana, for collection? A. Yes, and it was protested and I paid \$6.67 protest fees." It is urged that these questions are leading; that each suggests the answer desired. In this view of counsel we can not concur. Question twenty-one is further objected to upon the ground that when the witness answered "I had not" to the query "had you any notice or knowledge of any defense, legal or equitable", he did not show want of knowledge of any fact. We think the answer that he had no notice of any defense was the statement of a fact. Question twenty-four is objected to upon the additional ground that it calls for the expression of an opinion

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about a fact which the witness could not know to be true from personal knowledge, and which he could learn only through hearsay. This objection is well founded. The cashier could only know of the knowledge of the other officers of the bank from hearsay. This question and the answer thereto should have been stricken out.

After all the evidence had been introduced, appellee filed its written motion requesting the court to give to the jury the following instruction: "Under the evidence introduced in this cause, the plaintiff is entitled to recover of the defendants the full amount of the note in suit with interest thereon at the rate of six per centum per annum from the date of said note and your verdict should be for the plaintiff for that amount." The court gave the instruction to the jury, to which appellants duly excepted. The seventh, eighth, and ninth causes for a new trial present for review the action of the court in directing the verdict. It is claimed that the court erred in giving the instruction (1) because the motion did not specify the grounds upon which the instruction was asked; (2) courts have no authority to direct a verdict in favor of the party upon whom rests the burden of the issues; (3) there was a conflict in the evidence as to three different facts which were in issue. In support of the claim that the motion should have specified the grounds upon which the instruction was requested, appellants cite *Lewis v. Brown*, 89 Ga. 115; *Demill v. Moffat*, 45 Mich. 410, 8 N. W. 79; *Demill v. Thompson*, 45 Mich. 412, 8 N. W. 80; *Bergstrom v. Staples*, 82 Mich. 654, 46 N. W. 1035; *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. 837; *Mattoon v. Fremont, etc., R. Co.*, 6 S. D. 196, 60 N. W. 740; *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073.

We do not consider it necessary to consider these objections in detail. It was said in *Demill v. Moffat*, *supra*: "It must be a very clear case indeed that will justify the judge in taking the case from the jury on the evidence, and he should never do so without specifying the

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particular ground or grounds which appear to him to justify it." It is the settled law in this State that it is not only the right but the duty of the trial court to direct a verdict in cases where there is an entire failure of proof as to any material facts necessary to the cause of action or defense. *Williams v. Resener*, ante, 132; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. 261; *Gipe v. Cummins*, 116 Ind. 511; *Hall v. Durham*, 109 Ind. 434; *Carver v. Carver*, 97 Ind. 497; *Adams v. Kennedy*, 90 Ind. 318; *Wabash R. Co. v. Williamson*, 104 Ind. 154; *Hynds v. Hays*, 25 Ind. 31; *Dodge v. Gaylord*, 53 Ind. 365; *Steinmetz v. Wingate*, 42 Ind. 574; *American Ins. Co. v. Butler*, 70 Ind. 1.

Appellants insist that there was a conflict in the evidence on three material issues tendered by the answer. (1) The makers of the note signed it under an agreement with the payees that the note should be signed by certain other persons, who failed to sign it, and the appellee had notice of that fact at the time the note was purchased. (2) The note was procured by fraud, and appellee purchased it with notice of the fraud. (3) The note in suit was never delivered; and that the jury should have been permitted to pass upon these issues. We do not deem it necessary to consider at length these propositions. The question of the good faith of appellee was in question. In determining that question, it was proper to consider the fact that the cashier of appellee purchased the note with the knowledge that there were annual instalments of interest past due and unpaid. The instruction took from the jury the right to consider this circumstance. In this, the court erred.

Other questions discussed may not arise upon another trial, and they are not, therefore, considered. Judgment reversed, with instruction to sustain appellants' motion for a new trial.

DISSENTING OPINION.

HENLEY, J.—I can not agree with the conclusion reached by the majority of the court in this cause. The only evidence or circumstance tending to prove notice upon the part

of the holder of the note in suit of equities existing between the original parties to this note was the fact that the note did not show that the past due interest was paid at the time the note was purchased. It is hard to understand how the non-payment of interest can be held to be notice of the dishonor of commercial paper when such non-payment itself does not amount to dishonor.

The question in a case of this kind is not a question of negligence or diligence; it is wholly a question of honesty and good faith. The whole matter is summed up in one query, viz.: Did the purchaser have notice of the equities existing between the original parties to the contract? The notice must be actual notice, or such a combination of circumstances as will create a distinct legal presumption that the purchaser was acting collusively and in bad faith, and that he must have known the facts without inquiring. *Tescher v. Merea*, 118 Ind. 586; *Carroll v. Hayward*, 124 Mass. 120; *Kellogg v. Curtis*, 69 Me. 212; *Hankey v. Downey*, 3 Ind. App. 325; *Pape v. Hartwig*, 23 Ind. App. 333; *Church v. Clapp*, 47 Mich. 257, 10 N. W. 362; *Helmer v. Krolick*, 36 Mich. 371.

If the fact that the note at the time of its purchase did not show upon its face that the past due interest had been paid can be considered as a circumstance tending to prove notice to the purchaser of equities existing between the original parties to the contract, it certainly can not be regarded as such a combination of circumstances as would amount to a distinct legal presumption that the purchaser was acting in bad faith and must have known the facts without inquiring. If its legal effect fell short of this, it amounted to nothing. It was the same as if no evidence had been introduced. The lower court did right in refusing to submit the cause to the jury upon such evidence. It was the duty of the court to refuse to submit the question to the jury when the legal effect of the evidence would not sustain a verdict in favor of the party producing such evidence. *Williams v. Resener, ante*,

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132; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. 261; *Gipe v. Cummins*, 116 Ind. 511; *Hall v. Durham*, 109 Ind. 434; *Adams v. Kennedy*, 90 Ind. 318.

It is not a question of the weight of the evidence. It fails to meet the requirements of the rule of law. It amounts to no evidence. It is like a journey commenced but not finished. The judgment ought to be affirmed.

WILLIAMS v. CITIZENS' ENTERPRISE COMPANY.

[No. 3,308. Filed May 29, 1900. Rehearing denied October 10, 1900.]

CORPORATIONS.—*Enforcement of Stock Subscription*.—A subscriber to the capital stock of a proposed corporation can be compelled to pay such subscription only upon a showing that a *de jure* organization of the proposed corporation has been formed. *p. 352.*

SAME.—*Organization*.—*Statute Construed*.—Where it is sought to incorporate under the manufacturing and mining statute, §5051 Burns 1894, and it is specified in the articles that the objects of the corporation are to furnish motive power to carry on manufacturing and mining business, to manufacture all kinds of merchandise, and to sink and operate oil and gas wells, to take stock in other corporations, loan and donate money, etc., the articles of incorporation are void. *pp. 353-357.*

From the Henry Circuit Court. *Reversed.*

J. F. Duckwall and *M. E. Forkner*, for appellant.

F. Winter, for appellee.

ROBINSON, C. J.—Transferred from the Supreme Court.
Williams v. Citizens Enterprise Co., 153 Ind. 496.

Appellee sued to recover the amount of appellant's subscription to the capital stock of a proposed corporation. Demurrer to the complaint overruled. Demurrers were sustained to the eighteen paragraphs of affirmative answer. Trial upon the issues formed by the complaint and general denial, and verdict and judgment in appellee's favor. Motion for a new trial overruled, which ruling and the rulings on the demurrers are assigned as errors.

The complaint sets out the subscription contract and

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avers that after its execution certain named persons executed a certificate stating the corporate name of the corporation, the objects and purposes of which were to "promote and aid the growth of the city of Muncie and vicinity in Delaware county, Indiana; to locate, establish, carry on, maintain, and assist all kinds of mining and manufacturing companies and to furnish power, motive power, machinery, and buildings therefor; to buy, sell, and manufacture all kinds of merchandise; to sink, operate, buy and sell gas wells and to preserve and sell the product of oil and gas wells; to take stock in other corporations, loan, and donate their money, etc., and also stating therein" the amount of capital stock, the duration of the corporation, by whom the business of the corporation was to be conducted and names of directors for the first year.

It is argued at length that the complaint is insufficient. In discussing the complaint, and also the answers, appellant's counsel claim that the contract sued on is not enforceable, for the reason that the articles of association are void because of multifariousness and uncertainty in the statement of the object for which the corporation was formed. No question of estoppel is involved because it is not shown that appellant took any part in the attempted organization. The question presented is whether there has been such a compliance with statutory requirements as to constitute a *de jure* corporation. Appellant, having subscribed to the capital stock of a proposed corporation, can be compelled to pay his subscription only upon a showing that a *de jure* organization of the proposed corporation has been perfected. It is not enough to show facts constituting a mere *de facto* corporation. *Williams v. Citizens Enterprise Co.*, 153 Ind. 496; *Indianapolis, etc., Co., v. Herkimer*, 46 Ind. 142; *Rikhoff v. Machine Co.*, 68 Ind. 388; *Capps v. Hastings, etc., Co.*, 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259.

Corporations in this State may be created and may exist by virtue of general statutory authority, and by that only.

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If a corporation claims the right to exist for a certain purpose it must show that it was organized under a statute authorizing the creation of a corporation for that particular purpose. In this case an attempt was made to organize a corporation under the statute providing for the incorporation of manufacturing, mining, and other companies.

The section of the statute here involved, §5051 Burns 1894, §3851 Horner 1897, is as follows: "Whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical or chemical business, * * * or to supply any city or village with water; or to form union stock-yards and transit companies, and operating, maintaining and transacting the business incident to such companies; or to form grain-elevator companies, and constructing, maintaining and operating elevators, and transacting the business incident thereto; or to form companies for the purpose of buying and selling dry goods, carpets, boots and shoes, millinery goods, fancy goods or jewelry, in connection with the manufacture of such goods and articles, into any articles for which they are suitable, and for the sale of such articles, when they are so manufactured—they shall make, sign and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the object of its formation, the amount of capital stock, the term of its existence (not, however, to exceed fifty years), the number of directors and their names who shall manage the affairs of such company for the first year, and the name of the town and county in which its operations are to be carried on, and file the same in the office of the recorder of such county, which shall be placed upon the record, and a duplicate thereof in the office of the Secretary of State."

It is seen that many of the objects named in the articles of incorporation in question are not named in the above act, nor in the act for the incorporation of voluntary associa-

tions, nor are they named in any other legislative act. The objects named in the articles, and which are designated as corporate objects in the act above set out, are these: To furnish motive power to carry on manufacturing or mining business; to manufacture all kinds of merchandise, and to sink and operate oil or gas wells; considering the last named as the designation of a particular kind of mining business.

It is conceded that several objects and purposes are stated in the articles for which a corporation may be organized under the manufacturing and mining act. It is argued that this is permissible and that the point was so decided by this court in *Shick v. Citizens Enterprise Co.*, 15 Ind. App. 329; 57 Am. St. 230. But that case does not so hold. In that opinion is this statement: "The mere fact that the articles of association mention some purposes not within the purview of the statute does not vitiate the organization. * * * Some of the purposes of the organization, alleged in the second paragraph of the complaint as being in the articles of association, are within the provisions of section 5051, *supra*, of the manufacturers' and mining act." The complaint in that case was in two paragraphs, the theory of the first paragraph being that the subscription was made to an existing corporation, and in the second paragraph the subscription was made to a proposed corporation. The question now under consideration was not there considered, as the court, after holding the first paragraph of the complaint sufficient, said: "We are not required to determine the sufficiency of the second paragraph of the complaint."

To adopt appellee's view we must change the reading of §5051 Burns 1894, and wherein it specifies the classes of business set out we must use the word *and* where the legislature used *or*. This would lead to the result that it was the legislative intent that all the businesses enumerated in the section might be carried on by one corporation, for it must be admitted that if more than one class may be included in one corporate organization then all the classes

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named may be included. The legislature has seen proper to provide in separate acts for corporate organization to do banking, building and loan, railroad, and some other businesses. It is clear that under those acts a corporation could not be organized to do both banking and railroad business. They have no necessary relationship to each other, neither one is a mere incident of the other, and the legislature has expressly separated them. And under §5051, *supra*, there is no necessary relationship between supplying a city or village with water and maintaining and operating elevators, nor is either one a mere incident of the other. And the same may be said of all the classes of business named in the section. It is not to be inferred from the fact that all these classes of business are included in one act that they may be conducted by one corporation. The legislature, by placing banking and railroad business in separate acts, and thus providing for separate corporate formations, has no more effectually separated corporate organization for conducting those businesses than it has the classes of business enumerated in the above section. The use of the disjunctive *or* makes a complete enactment as to each class of business named. Taking the act as the legislature has written it and it must mean: "Whenever three or more persons may desire to form a company to carry on any kind of manufacturing business, * * * they shall make, sign and acknowledge a certificate in writing, which shall state the corporate name adopted by the company, the object of its formation," etc. Or "Whenever three or more persons may desire to form a company to carry on any kind of mining * * * business * * * they shall make, sign and acknowledge * * * a certificate," etc. And so with each class named. The act expressly requires that the certificate shall state the corporate name and the *object* of its formation. This means that the certificate shall state the particular class of business to be carried on under one of the designated heads, that the limitation of the business must be shown by a statement in the articles.

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Treating those of the objects named in the articles in question, which are not within the purview of the statute, as surplusage, there is left an attempted corporate organization for the purpose of furnishing motive power to carry on manufacturing and mining, to manufacture all kinds of merchandise, and to sink and operate gas wells. We must then give to the articles the construction that the corporators intended to conduct these various enterprises under one organization. There is no statute in this State authorizing a single corporate organization for the purpose of carrying on all or any two of these businesses. The objects of neither are incidental or secondary to the objects of either of the others, but the objects and purposes of each are primary. Each is entirely separate and distinct from the others. Either would properly be the subject of corporate organization, but the intention of the corporators, which must be gathered solely from the articles, does not indicate which was to be the exclusive purpose. We have no authority to select either of the three and ignore the others. The corporators must do that for themselves. It is manifest, from the reading of the statute, that it was not the legislative intent to authorize a corporate organization for all the purposes named in the statute, nor for any two or more of the purposes named.

In *West v. Bullskin, etc., Co.*, 32 Ind. 138, suit was brought to collect an assessment made by a ditching corporation. It was held that the objects of the corporation should be declared with reasonable distinctness, that the statute made such declaration a condition precedent to the organization, and without it no such corporation was authorized or could exist. The complaint in that case was held bad because it affirmatively showed that the object of the organization was not sufficiently declared in the articles of association.

In *People v. Beach*, 19 Hun 259, it is said: "The statute referred to provides for the formation of companies 'for the

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purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business.' This language is in the disjunctive, thus authorizing an organization for the carrying on of business, having in view either of these purposes as its auxiliary or means of producing results; nor does section twenty, which provides for extending the business of a company formed, or to be formed, to any *other* manufacturing, mining, mechanical or chemical business, 'confer the right to combine any two or more of these general purposes.' This section leaves the purpose of the organization still to be limited to one of the general classes of business designated in the act as manufacturing, mining, mechanical or chemical." See, also, *State v. Beck*, 81 Ind. 500; *Skelton Creek Draining Co. v. Mauck*, 43 Ind. 300; *O'Reiley v. Kankakee, etc., Co.*, 32 Ind. 169; *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566; *State v. International, etc., Co.*, 88 Wis. 512, 60 N. W. 996; *State v. Minnesota, etc., Co.*, 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; *Isle Royale, etc., Co. v. Osmun*, 76 Mich. 162, 43 N. W. 14; *In re Derveaux*, 54 Ga. 673; *In re Richmond Retail Co.*, 9 Pa. Co. Ct. 172; *In re Pennsylvania, etc., Assn.*, 1 Pa. Dist. 763; *In re Skandinaviska*, 3 Pa. Dist. 235; *In re Crown Bank*, L. R. 44 Ch. Div. 634, 32 Am. & Eng. Corp. Cas. 574.

As there is no statute authorizing the organization of a corporation for the purposes named, it follows that the articles of association are void.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

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[No. 3,219. Filed October 11, 1900.]

STENOGRAPHER.—*Action for Services.*—A litigant is not released from liability to a court reporter for copies of the evidence furnished him during the trial by such reporter by reason of the fact that he did not know that the services performed for him were such as were to

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be paid for in addition to her pay as reporter, since the duties of an official court reporter are fixed by statute, of which the litigant must take notice. *pp. 360, 361.*

ATTORNEY AT LAW.—*May Bind Client for Services of Stenographer.*—An attorney having general control of the trial of a cause may bind his client to pay for copies of the evidence furnished by a stenographer for use in the trial of such cause. *pp. 361-363.*

EVIDENCE.—*Attorney and Client.*—In an action by a court reporter for services rendered in furnishing a litigant copies of evidence to be used in the trial of his cause, evidence as to the amount such litigant paid his attorney as tending to show that the attorney was to pay for such services was properly rejected, since any agreement between defendant and his attorney relative to compensation, unknown to plaintiff, could not affect her claim. *pp. 363, 364.*

SAME.—*Privileged Communications.*—*Attorney and Client.*—In the trial of an action by a stenographer for services rendered in furnishing copies of evidence used in the trial of a cause, evidence by an attorney, who was acting as clerk for defendant's attorney in arranging and digesting the evidence, that defendant was present in court when the copies of the evidence were furnished and used, is not privileged. *pp. 364, 365.*

INSTRUCTIONS.—*Harmless Error.*—Where the verdict is right under the evidence, the cause will not be reversed because of an instruction given, which, when considered alone, was incorrect. *pp. 365, 366.*

From the Boone Circuit Court. *Affirmed.*

P. H. Dutch and *W. A. Dutch*, for appellant.

C. M. Zion and *Palmer & Palmer*, for appellee.

COMSTOCK, J.—Appellee sued appellant for services rendered in transcribing and furnishing copies of evidence used by attorneys of appellant in a certain suit in which he was plaintiff, for which she alleges he is indebted to her in the sum of \$100 and interest from April 1, 1899; that the services were rendered at his request, for his use and benefit, and for which he promised to pay. Appellant answered by general denial. A trial resulted in a verdict and judgment in favor of appellee for \$100."

This cause is before the court for the second time. The former appeal is reported as *Palmer v. Miller*, 19 Ind. App. 624. The judgment was then reversed upon the ground that under the evidence the appellant (now appellee) was en-

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titled to recover. The court also held that a recovery might be had upon proof of an implied promise, although the complaint averred an express one.

The error now assigned is the action of the court in overruling appellant's motion for a new trial. The reasons set out in the motion are the giving and refusing to give certain instructions and the admission and refusing to admit certain evidence. Appellee insists that the record does not show the filing of what purports to be the bill of exceptions containing the evidence, and that the greater number of questions argued by counsel for appellant are therefore not presented. In our opinion, the record shows a compliance with the act of the General Assembly approved March 3, 1899 (Acts 1899, p. 384). Under that act, the bill of exceptions containing the evidence is in the record.

Counsel for appellee also earnestly contend that the exceptions to the instructions are not properly reserved. Without passing upon this claim of appellee, we have in this opinion treated the questions discussed as properly presented.

The questions raised will be considered in the order in which they are discussed by appellant's counsel. Appellant requested the court to give the following instruction: "The court instructs the jury that they should take into consideration all the evidence given upon the trial to consider all the facts and circumstances shown by the evidence. The condition of the defendant, his knowledge of the matters alleged in the plaintiff's complaint, and if you believe that copies of the evidence alleged to have been furnished by the plaintiff were used by the attorney or attorneys of the defendant, and if you further believe that the defendant knew that such copies were furnished by the plaintiff at the time they were being used, and were being used for the defendant's benefit and with his consent, then it would be your duty to find for the plaintiff; but upon the other hand

if you believe from the evidence that the defendant did not know that such copies were furnished by the plaintiff, and he was not present at any time when said copies were furnished from time to time, and did not request plaintiff to furnish said copies, then you should find for the defendant unless you find that there was an express agreement entered into by and between the plaintiff and defendant to furnish said copies as alleged in plaintiff's complaint." The court modified the instruction by the insertion of the words "at any time" after the word "present." To this modification appellant excepted. This action of the court is made a reason for a new trial.

In support of this exception, counsel for appellant insist that the charge as requested announced the rule of law laid down in the case upon the former appeal, and that the modification changed its meaning. That as modified it said to the jury that if the defendant was present once during the trial when copies of the evidence were furnished, whether he saw the copies used or not, or whether they were used in his presence or not, then he would be liable, because it would be held to have been done with his knowledge or consent. In view of the fact that the evidence shows that the trial lasted for many days, that copies of the evidence were furnished to appellee's counsel from time to time and constantly used in his presence, that he knew at the time that no one but the reporter could furnish them, we are of the opinion that the appellant could not have been harmed by this instruction, even if it were error to make the modification.

The ninth reason for a new trial is the action of the court in refusing to give the following instruction requested by appellant: "The court instructs the jury that in determining whether the defendant expected that the services alleged to have been rendered by the plaintiff were to be paid for by defendant, you may take into consideration, together with the other evidence given upon the trial, the fact, if shown by the evidence, that the plaintiff was an official reporter of

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the court in which the cause was being tried in which she alleges that she furnished the copies described in her complaint, and whether the defendant knew that the services alleged to have been performed by plaintiff were such services as were to be paid for in addition to her pay as such court reporter to be paid for by the parties to said action." In this there was no error. The duties of the reporter are defined by statute, of which the litigant must take notice. The instruction is based upon the erroneous theory that unless the defendant knew that the services performed by the reporter for him were such as were to be paid for in addition to her pay as reporter, he would not be liable.

The tenth reason for a new trial is the giving of instruction number one, asked by the appellee. To this instruction objections are made (1) that while it attempts to state, it does not correctly state the averments of the complaint; (2) that it is in conflict with the instruction given by the court on its own motion. These objections are not well taken. They are not sustained by the record.

The twelfth and thirteenth reasons for a new trial relate to the same question—the refusal of the court to permit appellant to testify that he never employed nor authorized his attorney to employ the appellee. It is claimed in appellant's brief that appellee testified that appellant had authorized her employment by his attorneys. No reference is made to any part of the record where such evidence is to be found, and we find none. If an attorney having general control of a cause has authority by virtue of such relation to bind his client for the value of copies of evidence furnished by a stenographer and used in the cause, the client would be liable in the absence of special authority, and he would still be bound, notwithstanding he was ignorant of the employment of the stenographer. The authority of the attorney under the evidence in this cause is the controlling question presented.

In *Harry v. Hilton*, 64 How. Pr. 199, it is held that a

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client is responsible for stenographer's fees in proceedings in a case where such stenographer is employed by attorneys to take the minutes, the court saying: "These cases introduce no new rule in the law regarding contracts, but simply enforce on old one. Their significance, however, lies in the fact that in the decision of these cases, the courts assume that such action upon the part of the attorney is presumably within the scope of the authority conferred upon him, when he is retained by his client, and that the attorney has the right to bind his client for any service which may be necessary and proper not only for the preparation of the case for trial, but for the convenient conduct of such trial, and the proceedings thereafter taken." Citing *Covell v. Hart*, 14 Hun 252, and *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

In *Williamson-Stewart, etc., Co. v. Bosbyshell*, 14 Mo. App. 534, it is held that an attorney has implied powers to bind his client by a contract for the printing of briefs for use in an appellate court.

In *Moulton v. Bowker*, 115 Mass. 36, the court held that an attorney at law has authority by virtue of his employment as such to do in behalf of his client all acts in and out of court necessary or incidental to the presentation and management of the suit which affect the remedy only and not the cause of action. See *Clark v. Randall*, 9 Wis. 128; *Nelson v. Cook*, 19 Ill. 440, 453; *Newberry v. Lee*, 3 Hill 523; *Oestrich v. Gilbert*, 9 Hun 242; *Jenney v. Delesdernier*, 20 Me. 183, 191; *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194.

In *Thornton v. Tuttle*, 20 Abb. N. Cas. 308, it is held that the attorney for a party to an action has implied authority to bind his client by the employment of a stenographer to take and write out the testimony of witnesses upon a reference of a special issue. In commenting upon the testimony, the court say: "The plaintiff Thornton says he had no knowledge, and it does not appear that he had before the trial, of the order of reference which directed the

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payment by the defendants in that action of the expenses of taking the testimony. And it might not have defeated the plaintiff's recovery if he had. The plaintiff Thornton had the right to assume, unless in some manner advised to the contrary, that the attorney who employed him had the authority which his relation as such to his clients imported. And his right of action against them was not affected by any secret or confidential instructions given by them to him qualifying his authority." The following cases are cited in the opinion: *Judson v. Gray*, 11 N. Y. 408; *Bonynge v. Field*, 81 N. Y. 159; *Bonynge v. Waterbury*, 12 Hun 534; *Sheridan v. Genet*, 12 Hun 660; *Covell v. Hart*, 14 Hun 252; *Harvey v. Hilton*, 64 How. Pr. 199.

In *Bonynge v. Field*, *supra*, the court held that in the absence of a special agreement making a personal liability, an attorney for one of the parties to an action could not be held personally responsible for the services of a stenographer. To the same effect is *Bonynge v. Waterbury*, *supra*.

In *Sheridan v. Genet*, *supra*, it was held that where a stenographer furnishes a copy of the testimony given upon the trial of an action to one whom he knows acted as counsel for one of the parties thereto, he can not recover the price thereof from such counsel unless the latter expressly binds himself for the payment thereof, following *Bonynge v. Waterbury*, *supra*. See, also, *Hogate v. Edwards*, 65 Ind. 372.

Under the foregoing decisions, we feel warranted in holding that the attorneys in the case at bar had authority to bind their client, the appellant, to pay appellee for the copies of the evidence which she furnished at their request.

Appellee testified in her examination in chief, no objection being made thereto, that two trials of appellant's case were had, in the first of which the jury returned a verdict in his favor for \$12,000; in the second, for \$10,000.

The counsel for appellant propounded to him in his ex-

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amination in chief, the following question: "State the amount of attorney fees you paid in your case against the Monon Railroad Company." The court sustained an objection to this question, and refused to permit appellant to prove that he had paid \$3,070 in attorney fees in the cause. These rulings of the court are made the fourteenth and fifteenth reasons for a new trial. It is urged that it was proper thus to show the real amount received by appellant, and rebut the claim of appellee that appellant was to pay her and throw light on the question as to how the parties expected her to be paid. If appellee was entitled to compensation from appellant, neither the amount paid to his attorney as fees, nor his understanding, unknown to her, could affect her claim. The evidence sought to be elicited was immaterial. They also propounded to him the following question: "State what knowledge you have of proceedings in court." The court sustained an objection to this question, and this ruling is made the ground for the sixteenth and seventeenth reasons for a new trial. The claim of appellee acting under authority of appellant's counsel could not be affected by appellant's knowledge or want of knowledge of proceedings in court. Appellee testified that she did the work for which she sues at the request of appellant's counsel. In this she was not contradicted.

The eighteenth and nineteenth reasons for a new trial relate to the admission of the testimony of Joseph H. Ricketts, a young attorney who testified to having arranged and made a digest of the evidence, a delivery of the copies transcribed by the appellee for the defendant and of the use made of the copies. This work was done while he was acting as clerk for Mr. Gard, one of the attorneys for appellant.

The material fact to which this witness testified was that appellant was in the court room when appellee was acting as reporter, when the copies of the evidence were furnished his attorneys, and when in the trial of the cause such copies

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were used by them. He was not the attorney for appellant. These material facts occurring in the court room in the trial of the cause were not privileged.

The twentieth and twenty-first reasons for a new trial relate to a conversation testified by appellee to have occurred between herself and Mr. Wesner, an attorney for appellant in his absence. This conversation was given without objection. Appellant then moved to strike it out. The court overruled the motion. The objection should have been made before the testimony was given. But as the attorneys were competent to bind their client, the evidence was competent. *Cleveland, etc., R. Co. v. Wynant*, 134 Ind. 681.

The twenty-second reason for a new trial is the alleged error of the court in overruling appellant's objection to appellee's question as to the use of the evidence upon the second trial, transcribed and delivered to attorneys for appellant in the first. In this there was no error.

Counsel for appellant discuss the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh reasons for a new trial together. In these reasons for a new trial appellant's learned counsel seek to show that the trial court erred in not permitting the proof of the agreement between appellant and his counsel, Mr. Wesner, under which all expenses were to be paid by Wesner; that while he had paid one of the reporters for services rendered his attorneys, the amount so paid had been deducted from the attorneys' fee.

As it is not claimed that appellee had knowledge of this agreement, it could not have affected her, and the evidence is therefore immaterial.

Appellant makes the giving of instruction number three requested by appellee the eleventh reason for a new trial. The correctness of this instruction considered alone may well be questioned; but we have read the evidence, and accepting the law as announced in the opinion upon the former

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appeal as the law of the case, we are satisfied that upon the evidence the verdict was right. Under numerous decisions, erroneous instructions are not a cause for reversal when the verdict is right. *Stockwell v. Brant*, 97 Ind. 474; *State v. Ruhlman*, 111 Ind. 17; *Woods v. Board, etc.*, 128 Ind. 289.

We find no error for which the judgment should be reversed. Judgment affirmed.

ROBERTS v. THE STATE.

[No. 8,510. Filed October 11, 1900.]

GAMING.—Visiting Gambling House.—Statute Construed.—A single visit to a gambling house is a misdemeanor within the meaning of §2089 Burns 1894. *p.* 367.

SAME.—Circumstantial Evidence.—A finding that a particular room was a "gambling house," within the meaning of §2089 Burns 1894, will not be disturbed on appeal, where circumstances were shown from which the trial court could reasonably and legitimately infer such fact. *pp.* 372, 373.

SAME.—Affidavit and Information.—Judgment.—Variance.—Where an affidavit and information charges defendant with visiting a gambling house, a finding and judgment that "the defendant is guilty of frequenting a gambling house as charged" is sufficient, since the words "of frequenting a gambling house" are surplusage. *pp.* 374, 375.

From the Monroe Circuit Court. *Affirmed.*

J. R. East, R. H. East and J. E. Kelley, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

WILEY, J.—Appellant was prosecuted and convicted for visiting a gambling house, and his motion for a new trial was overruled. He has assigned errors (1) that the court erred in overruling his motion to quash the affidavit and information; (2) that the court erred in overruling his motion for a new trial. We will discuss and decide these questions in the order named.

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The affidavit and information rest upon §2089 Burns 1894, §2002 Horner 1897. That section defines several offenses, but when applied to the offense charged against appellant is as follows: "Whoever, being a male person,
* * * frequents or visits a gambling house or houses,
* * * shall be fined," etc.

The charging part of the affidavit is that the appellant "on the 31st day of May, A. D. 1899, at and in the county of Monroe and State of Indiana, being a male person, did unlawfully visit for the purpose of gaming a certain place where gambling was permitted, to wit, a certain room, then and there occupied by one Walter Neeld, situate," etc. The information is substantially in the same language.

A change of venue being taken from the regular judge, Hon. G. L. Reinhard was appointed special judge to try the case.

The objection urged to the affidavit and information is that they only charge appellant with having made a single visit to a gambling house, and that a single visit is not an offense within the meaning of the statute. Counsel for appellant say that since the statute was amended in 1889, it has not been construed by a court of last resort. A brief review of the history of legislation upon the subject-matter of the statute, and the decisions of the court thereunder, may materially aid in its construction and in arriving at the intention of the legislature in enacting it.

We do not deem it necessary to go back in legislative history farther than the revision of 1881. At that time, the language of the statute was: "Whoever being a male person, * * * frequents gambling houses," etc. §2002 R. S. 1881. The word "visit" or "visits" did not occur in the statute. At that time there was also a statute defining a "common gambler", and that statute was as follows: "Whoever, for the purpose of gaming with cards or otherwise, travels about from place to place, or frequents any place where gambling is permitted, or engages in gambling

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for a livelihood, is a common gambler," etc. §2085 R. S. 1881.

In the case of *Green v. State*, 109 Ind. 175, appellant was indicted for frequenting a gambling house, and on trial was convicted. The evidence showed that at the time charged appellant was seen at the room designated engaged in a game where money was wagered, but there was no evidence to show that he had ever been there at any other time. Upon this evidence the Supreme Court reversed the judgment on the ground that proof of one visit to a gambling house was not sufficient to sustain an indictment for frequenting a place where gambling was permitted. The court by Niblack, J., said: "Proof of an occasional visit to a house in which gambling is permitted is not sufficient to sustain a conviction in a case like the one before us. To make the frequenting of such a house a misdemeanor, it must be something akin to, or in the nature of, a habit." This decision was rendered January 12, 1887. In 1889 the legislature amended section 2002, *supra*, and that section as it now is reads as follows: "Whoever, being a male person, frequents or visits a house or houses of ill-fame or of assignation; * * * or frequents or visits a gambling house or houses; * * * shall be fined," etc. Counsel for appellant argue that the word "visits", as used in the statute, is plural, and as only one visit is charged against the appellant, the affidavit and information do not charge an offense as defined by the statute. We think this argument is fallacious. The word "visits," as it is used in the statute, is a verb, and as used is singular, and not plural. It would have been an unpardonable grammatical error for the legislature to have used the word "visit" where the word "visits" occurs. We have no doubt but what the legislature, in the exercise of its police powers, could make it an offense for a person to make a single visit to a gambling house or houses, and this is just what it intended to do in the amended section of the statute under which this prosecu-

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tion is waged. And we do not know how such intention could have been more distinctly or clearly expressed. It will be observed that the same language is used relating to visiting a house or houses of ill-fame, as that employed in defining an offense for frequenting or visiting a gambling house. Counsel for appellant certainly would not contend that before a person could be convicted of visiting a house of ill-fame he would have to be charged with frequently visiting it, and the proof made to harmonize with the charge. It was the intention of the legislature to guard the morals of the citizens so far as it was possible, and to forbid any one from visiting such places of iniquity. The mere statement of the fact of a single visit by a male person to a house of ill-fame is its own argument in support of the proposition that a charge of such visit and proof thereof would sustain a conviction under the express language of the statute. It is to be remembered that we are not discussing what would constitute "frequenting" such places. There is a wide difference between the words "frequenting" and "visits," as used in the statute. The former means to visit often; to resort to often or habitually, etc. Webster's Dict. It was this very meaning of the word "frequents", and the construction put upon it by the courts, that prompted the legislature to amend the statute in 1889, so that the intention of the legislature might become manifest, and the violation of its prohibition be properly punished. We think there can be no doubt about this proposition, that a single visit to a gambling house is a misdemeanor within the meaning of the statute, a violation of its provisions, and hence must hold that the offense is sufficiently charged in the affidavit and information. The motion to quash was properly overruled.

Appellant's motion for a new trial was based upon the following grounds: (1) Insufficiency of the evidence; (2) no evidence to sustain the finding; (3) the finding is con-

trary to law; (4) the finding is contrary to the law and the evidence. It is earnestly urged that there is no evidence to support the finding and judgment.

The evidence shows that on the day charged in the indictment two police officers went to the room rented and occupied by one Walter Neeld. This visit of the officers was made between 1 and 2 o'clock in the morning. They found there the defendant and six other men. These officers testified that two of the occupants were playing cards; that one of the parties playing had \$1.50 in money in front of him; that both parties playing had poker chips in front of them; that there were poker chips in the middle of the table; that the appellant was sitting at the table where the playing was going on; that the table was round with a cloth top; that there was a drawer in the table; that said Neeld, the occupant of the room, was sitting at the table by the drawer and dropped in a check or two once in a while, which he took from the center of the table. The evidence further shows that the room in question was immediately over a saloon kept by one Strothers, who was one of the parties playing cards; that no one lived over the saloon, and that all the furniture in the room was a poker table, a few chairs and a sofa. The appellant admitted that he was at the room the night in question, and testified that it was the only time he was ever there; that he was invited there on that night by Neeld, the occupant, to have some lunch; that some lunch was brought; that he ate a part of it; that he did not see any one gambling; that he did not know the room was a place where gambling was permitted; that he did not see any money on the table. Neeld testified that on the night in question he invited the appellant and others up to his room to have some lunch; that he rented the room for an office, and used it for the purpose of an architect's or contractor's office; that he found there a table, some chairs, some poker chips, and a few other articles; that he went out and got some lunch; that two of the party, Strothers

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and Nicholson, engaged in a game of seven-up; that he counted the points made, with the poker chips; that there was \$1.50 on the table which belonged to Nicholson, being the change out of a \$2 bill after buying the lunch; that none of the money was bet on the result of the game; that the checks represented nothing of value; that he did not receive any percentage or commission from the game; that the room was not kept by him for the purpose of allowing persons to gamble there, and that there was no gambling there while he had control of it. Other witnesses who were in the room at the time testified on behalf of appellant, and on all material facts their evidence was in line with that of Neeld. It is upon this evidence that appellant asks a reversal.

Under the rule, which has never varied in this State, we can not reverse a case on the evidence, if there is any evidence to support the finding and judgment. Our first inquiry is, therefore, is there any evidence in the record to support the judgment of the trial court. Two substantive facts had to be proved to warrant a conviction: (1) That appellant visited the place charged, and (2) that such place was a gambling house. We may dismiss the first inquiry by saying that it was shown by direct evidence and the admission of the appellant that he was at the place charged and at the time charged. As to the second inquiry, it may be remarked that there is no direct evidence in the record to show that such place was a gambling house, or a place where gambling was permitted, and hence, if it was necessary to establish the fact by direct and positive evidence, the State has wholly failed. But such is not the law. It often occurs in prosecutions for the violation of criminal statutes that it is utterly impossible to establish the defendant's guilt by direct and positive evidence, and if the State did not have resort to other means of proof the guilty would go unpunished. In prosecutions for crime, it is often necessary to establish guilt by circumstantial evidence. The word "evidence", as used in judicial language, signifies all the

means by which the existence or non-existence of disputed facts is established. Greenleaf on Ev., (15th ed.) §1. Circumstantial evidence is one of the means of establishing a fact in dispute. So that if the record in this case established the fact that appellant visited a gambling house, it must be admitted that it was established by such evidence.

In the early judicial history of this State, Judge Blackford declared the law to be that it is a question for the jury, under the evidence before them, to decide whether or not a particular room was used for gambling, and that they might so find from circumstances indicating that gambling was going on in the room. *Armstrong v. State*, 4 Blackf. 247. The same rule was adhered to in the case of *State v. Miller*, 5 Blackf. 502, and in *McAlpin v. State*, 3 Ind. 567. If circumstantial evidence in such cases satisfies the jury beyond a reasonable doubt that the place charged is a gambling house, it is sufficient. 14 Am. & Eng. Ency. of Law, (2nd ed.) 526; *State v. Worth*, R. M. Charlt. (Ga.) 5; *State v. Oswald*, 59 Kan. 508, 53 Pac. 525; *Cox v. State*, 95 Ga. 502, 20 S. E. 269.

In the last case cited, it was held that a house alleged to have been kept as a gambling house must be clearly established by the evidence, but that its character may be inferred from circumstantial evidence. See, also, *Pacetti v. State*, 82 Ga. 297, 7 S. E. 867; *Robbins v. People*, 95 Ill. 175; *Stevens v. People*, 67 Ill. 587; *State v. Boyer*, 79 Iowa 330, 44 N. W. 558; *Harper v. Commonwealth*, 93 Ky. 200, 19 S. W. 737; *State v. Grimes*, 74 Minn. 257, 77 N. W. 4.

In the case before us, the trial judge exercised the functions of a jury. He heard and weighed the evidence, and was convinced beyond a reasonable doubt of appellant's guilt. Under the rule so well established by the authorities we have cited, which hold that the pivotal fact which we are now considering may be inferred from circumstances, we can not reach the conclusion that there was no evidence to war-

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rant a conviction. There were many circumstantial facts from which the court could properly infer that the room in question was a place for gambling. In that room were six or seven men sitting about a round table with a cloth cover, and they were found there at about 1:30 o'clock Sunday morning. There were cards, money, and poker chips on the table. At least two of the parties were playing cards, and both of the parties playing had poker chips in front of them, and one of them had money on the table in front of him. There were also poker chips near or in the center of the table from which the person who occupied the room occasionally took a chip and dropped it in a drawer of the table. We think these are facts from which the court could draw the reasonable and legitimate inference that the room was a gambling house, within the meaning of the statute.

The evidence on the part of the appellant does not appeal to the mind and conscience of the court with sufficient force to override the inference to be drawn from the above stated facts, but carries with it an air of suspicion that casts upon it grave doubt and unbelief. This is doubtless the way it impressed the trial judge. It is unreasonable to believe that the parties who were found in that room and who were invited there, as the evidence tends to show, by Neeld, to partake of a lunch, would remain there until the late hour named for that sole purpose. Another fact which casts suspicion upon the statements of appellant is that though Neeld invited the party to a lunch at his own room, the lunch was actually purchased with money of one of the guests, and that the money that was seen on the table was \$1.50, which was left out of a \$2 bill after purchasing the lunch. So we conclude that under all the facts, if the room occupied by Neeld, where he was surrounded by his guests, was not a place for gambling, then in the language of the court in *Waugh v. Waugh*, 47 Ind. 580, 584, we say: "Human nature is inconstant, and inductive reasoning utterly fallacious." We can not therefore disturb the finding and judgment on the evidence.

This leaves but one question for decision. The finding of the court is as follows: "The court being sufficiently advised in the premises, finds the defendant guilty of frequenting a gambling house as charged." The judgment follows the language of the finding. Counsel argue that appellant was found guilty of a crime other than that charged. Concede this to be true, the error of the court, if it be error, is harmless. The punishment fixed by statute is the same for frequenting as it is for visiting a gambling house. There is no difference in the grade of the offense, or the punishment provided by law. It follows, therefore, that the error in the finding and judgment is harmless, and the rule is ancient, that a judgment will not be reversed for harmless error. But the exact question in principle has been decided adversely to appellant.

In *Evans v. State*, 150 Ind. 651, appellant was charged with petit larceny. Upon the trial, the court instructed the jury if they found from the evidence that appellant was being tried for a second offense, having before been convicted of petit larceny, they would be authorized to find him guilty of grand larceny. It was held that, where the statute prescribed a greater punishment upon a second or subsequent conviction for an offense, the former conviction must be alleged and proved at the trial, or the same could only be punished as a first offense. In passing upon the question that the jury found him guilty of "grand larceny as charged," the court, by Monks, J., said: "The verdict in this case found appellant 'guilty of grand larceny as charged in the information', but the verdict must be construed in connection with the information, as he was only found guilty of the offense charged therein, which was petit larceny. The verdict, therefore, only found the appellant guilty of petit larceny, and the error of the court, if any, committed in instructing the jury as to their being authorized to find appellant guilty of grand larceny, was harmless. As the verdict only found the defendant guilty of petit larceny,

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which was charged in the information, and as the evidence is not in the record, the same can not be said to be contrary to law."

In the case before us, appellant was charged with visiting a gambling house. Under the information and proof, he could not have been found guilty of any other offense. We may properly regard the words in the finding and judgment "of frequenting a gaming house" as surplusage, and yet the finding and judgment would be sufficient. He was found guilty "as charged," and having been charged with visiting a gambling house, we must hold that the finding and judgment are sufficient. Judgment affirmed.

TRAMMEL ET AL. v. BRIANT ET AL.

[No. 3,129. Filed October 12, 1900.]

APPEAL AND ERROR.—Damages.—Evidence.—A judgment for damages arising from the breach of an oil and gas lease will not be reversed on appeal because of insufficiency of damages awarded, where the evidence as to damages is conflicting.

From the Huntington Circuit Court. *Affirmed.*

W. H. Trammel, J. C. Branyan, J. S. Branyan, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellants.

J. S. Dailey, A. Simmons and F. C. Dailey, for appellees.

HENLEY, J.—This was an action by appellants against appellees for damages growing out of the alleged breach of a gas and oil lease. The original lessors conveyed the leased land and assigned the lease to the appellants before the commencement of this action. The lease, omitting the description of the leased premises, was as follows: "This indenture witnesseth, that William F. Trammel and Lucy Trammel, his wife, of Huntington county, Indiana, party of the first part, for the consideration herein provided, do hereby grant, bargain and lease and convey unto Cyrus E. Briant of Huntington county, Indiana, party of the second part, all the oil and gas in and under the following

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described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil and gas taken from said premises, excepting and reserving for the first party the one-sixth part of all oil produced and saved from said premises, to be delivered in the pipe-line with which said party may connect his wells, namely all that certain tract of land, etc. * * *. To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay \$125 each year for the product of each well, while the same is being used off the premises, and first party to have gas free of cost at wells to heat all stoves in dwelling-house during the same time. Whenever first party shall request, second party shall bury all oil and gas lines and pay all damages done to growing crops by reason of burying and removing said pipe lines. In case no well is completed within ninety days from this date, then this grant shall be null and void unless second party shall pay to the first party \$2 per day that such completion is delayed. The second party shall have the right to use sufficient gas, oil, or water to run the machinery for operating said wells and also the right to remove all property at any time, and it is further agreed that the party of the second part shall drill a well every sixty days thereafter until eight wells are completed; and it is further agreed that all under-drains on premises shall not be disturbed and all gates shall be kept closed on said premises. It is understood between the parties to the agreement that all conditions between the parties hereto shall extend to their heirs, executors and assigns."

Cyrus E. Briant assigned his interest in the lease to one William H. Line, who in his turn assigned the lease to C. P. Collins.

It is alleged in the complaint that in accordance with said lease appellees drilled one well on the leased land

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within ninety days from its execution, and that said well was drilled prior to the sale and conveyance of the land and lease to appellants; that said well was pumped for twenty or thirty days, and yielded to the former owner of said land a royalty, under the contract, of \$35. That after the purchase of said land by appellants, and the assignment of said lease to them, the appellees, in violation of their contract, ceased to pump said well, and wholly failed to drill any more wells as said lease provided, whereby appellants were damaged in the sum of \$1,700 in that the rental which would have accrued to appellants would have amounted to that sum if appellees had fulfilled their said contract. There is the further allegation that one Ovid M. Conner and the Superior Oil Company have some interest in said lease unknown to appellants, and they are made parties to answer as to their interest therein.

Appellees' answer was in five paragraphs; the first a general denial; the second and third paragraphs are substantially the same. In both the second and third paragraphs of answer it is alleged that after the execution of the lease mentioned in the complaint, and before the purchase of the real estate therein described and before the purchase by and assignment of the lease to appellants, appellees caused a well to be drilled and completed on said real estate, and caused said well to be properly equipped for pumping and producing oil; that said well would not and did not produce any gas, and would not and did not produce oil in sufficient quantities to pay for the pumping; that appellees gave said well a true, sufficient, and honest test, and that it would not produce oil but produced salt water in large quantities, and was what is designated as a "dry hole"; that all the land embraced in the lease sued on was barren of oil or gas, and would produce neither in sufficient quantities to pay the expenses connected with the wells if the wells mentioned in the lease had been drilled and equipped.

According to our view of this case, the issue raised by the

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fourth and fifth paragraphs of answer is immaterial to the discussion of the question presented by the record.

Appellants recovered a judgment below for \$5. The only question presented on appeal arises from the ruling of the lower court in overruling appellants' motion for a new trial. It is contended that the judgment is erroneous, being too small.

The damage to appellants arising from the breach of the contract is specifically pointed out in the complaint. The sole and only claim made by appellants is that appellees "wholly failed to drill any more wells as per agreement, to the damage of these plaintiffs in the sum of \$1,700, in this, that the rental which would have inured to them would have been in that sum had they performed said contract." Whether or not appellants were damaged by a failure to drill the wells as the contract provided was the question before the court for trial. The evidence upon this question is conflicting, and we will not disturb the judgment. Judgment affirmed.

DAVIS v. BICKEL ET AL.

[No. 8,155. Filed October 12, 1900.]

COURTS. — Justices of the Peace. — Jurisdiction. — Presumption.—A justice of the peace court being of special limited jurisdiction no presumptions will be indulged as to its jurisdiction, but when it is made to appear that it has acquired jurisdiction the same presumptions are indulged in favor of its proceedings as of courts of general jurisdiction. *pp. 379-382.*

GARNISHMENT. — Action on Bond. — Validity of Proceeding. — Estoppel.—Where a plaintiff instituted an action in garnishment before a justice of the peace, filed an affidavit and bond conditioned that he would prosecute his proceedings in garnishment to effect and pay all damages if such proceedings should be wrongful or oppressive, and procured the issuance of a writ of garnishment, he will be estopped from setting up the defense, in an action on the bond, that no affidavit in attachment was ever filed and the writ was improperly issued. *pp. 382, 383.*

From the Marion Circuit Court. *Reversed.*

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J. R. Morgan, L. A. Morgan and C. E. Averill, for appellant.

J. A. Pritchard, for appellees.

ROBINSON, C. J.—On May 10, 1897, appellee Bickel sued appellant before a justice upon a judgment previously rendered, and filed the affidavit provided for in §943 Burns Supp. 1897, and also filed his written undertaking, with his co-appellee as surety, conditioned that he would prosecute his proceedings in garnishment to effect and would pay appellant all damages he might sustain if such proceedings should be wrongful and oppressive; a writ of garnishment was issued and served, and under it money owing to appellant was held until the case was finally determined in appellant's favor. Appellant now sues upon the bond in garnishment.

Appellees answered in denial. Also a second paragraph of answer alleging that the affidavit in garnishment was the only affidavit ever filed in the cause in which the bond was given and that no affidavit in attachment was ever at any time filed. A demurrer to this paragraph was overruled. Appellant replied that appellee Bickel was estopped to question the validity of the bond in garnishment because as his own attorney he had represented to the justice that the affidavit was sufficient to authorize the issuing of the writ of garnishment, and from that fact the writ was issued. A demurrer to this reply was sustained.

The court of a justice of the peace is one of special limited jurisdiction. Although it is a court created by the Constitution, its powers and duties are prescribed by statute. No presumptions will be indulged that it has, in any case, acquired jurisdiction, but when it is made to appear that it has acquired jurisdiction the same presumptions are indulged in favor of its proceedings as in case of courts of general jurisdiction. *Bernhamer v. Hoffman*, 23 Ind. App. 34; *Wilkinson v. Moore*, 79 Ind. 397; *Smith v. Clausmeier*, 136 Ind. 105, 43 Am. St. 311.

As a justice has no civil jurisdiction at common law a bond taken by him can not be sustained as a common law obligation. It must be a valid bond under some statute or it will be void.

In the case at bar the amount in controversy was within the jurisdiction of the justice, a summons was served on appellant and a writ of garnishment served on the garnishee defendant. Appellant appeared and resisted the garnishment proceedings and the garnishee was discharged. It thus appears that the justice had jurisdiction of the subject-matter of the action and of the person of appellant.

In *Pomeroy v. Beach*, 149 Ind. 511, it is held that the act of 1897 (Acts 1897, p. 233, §943 Burns Supp. 1897), is simply amendatory of the section of the code of civil procedure concerning proceedings in attachment and garnishment, and that under the amendatory act, as before the act of 1897, an affidavit in attachment must be filed, as well as an affidavit in garnishment, before the garnishee summons can issue.

In *Hart v. O'Rourke*, 151 Ind. 205, appellee had previously sued appellant before a justice of the peace and filed an affidavit and undertaking for a writ of garnishment against a railroad company. No affidavit in attachment was filed. A writ of garnishment was served on the garnishee, and a summons on appellant, who appeared and answered. The cause was tried and a judgment rendered against appellant and the garnishee directed to pay a named sum into court. Appellant sued to enjoin the enforcement of that part of the judgment against the garnishee on the ground that it was void. It was held that while the justice proceeded upon the erroneous theory that proceedings in garnishment might be commenced and prosecuted to judgment without an affidavit for attachment (*Pomeroy v. Beach*, 149 Ind. 511), yet the judgment against the garnishee was not void. The court said: "The justice had jurisdiction of the subject-matter of the action, and of the person of appellant

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and the garnishee. The proceedings in garnishment were not the foundation of that action, but they were merely ancillary thereto. The judgment against the garnishee in that case, although erroneous, was not null and void." Citing *Earl v. Matheney*, 60 Ind. 202; *Williams v. Hitzie*, 83 Ind. 303; *Johnson v. Ramsay*, 91 Ind. 189; *Brown v. Goble*, 97 Ind. 86.

In the case of *Hart v. O'Rourke*, *supra*, a collateral attack was made on a judgment which was simply irregular. This irregularity arose from the issuing of a writ of garnishment without an affidavit in attachment having been filed. But the case expressly holds that the justice had jurisdiction of the person of the garnishee.

In *Sammons v. Newman*, 27 Ind. 508, a defense in an action on a replevin bond, that no suit was pending when the bond was executed because no writ of summons ever issued in the replevin suit, was held bad.

In *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126, it is held that a replevin bond, approved by a justice in an action where the value of the property exceeds the jurisdiction of the justice, is void and no action can be maintained thereon. It is seen that in this case the justice had no jurisdiction of the subject-matter.

In *Butler v. Wadley*, 15 Ind. 502, an appeal bond, executed to procure an appeal to the circuit court from an award rendered against a canal company, was held to be not without consideration, although the award, from which the appeal was taken, was void. See *Sherry v. Foresman*, 6 Blackf. 56.

In *Sumpter v. Wilson*, 1 Ind. 144, in a suit on an attachment bond, a plea that the bond was not executed until after the issuing of the writ and for that reason the proceedings in the attachment suit were quashed, was held bad. See, also, *Speake v. United States*, 9 Cranch 28.

In *Earl v. Matheney*, 60 Ind. 202, it was held that a judgment against a garnishee served with process in a suit

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against a debtor served with process and for a sum within the justice's jurisdiction, is not void, although no attachment proceedings were had against the debtor.

In *Harbaugh v. Albertson*, 102 Ind. 69, a plea by a surety in a suit on a replevin bond given in proceedings before a justice of the peace, that the justice was related within the prohibited degree to all the parties to the action, was held bad; the court holding that the surety, in equity and good conscience, ought to be estopped from setting up such facts after having, through the bond, enabled the principal, who had voluntarily submitted his person to the jurisdiction of the justice, to gain possession of the property.

In *Carver v. Carver*, 77 Ind. 498, a plea to an action upon a replevin bond given in proceedings before a justice, that the bond was void because the penalty was not double the value of the property sought to be recovered, was held bad. In that case the court said: "The principal obligor tendered the bond in suit to the justice as being such as the law required, and thus secured the writ which put him in possession of the personal property of another. The plainest principles of justice require that neither he nor his sureties should be permitted to defend against the bond upon the ground that a sufficient penalty was not provided. To permit such a defense would be to allow the party to take advantage of his own wrong in carelessly or purposely failing to file a sufficient bond. There can be no doubt that the case is one to which the doctrine of estoppel fully and justly applies." See *Trueblood v. Knox*, 73 Ind. 310.

In *Bernhamer v. Hoffman*, 23 Ind. App. 34, it is held that a suit may be maintained on an appeal bond although it affirmatively appears that the justice had no jurisdiction of the subject-matter of the original action. See also *Waddell v. Bradway*, 84 Ind. 537; Elliott's Gen. Prac. §267; *Robertson v. Smith*, 129 Ind. 422, 15 L. R. A. 273; *Cunningham v. Jacobs*, 120 Ind. 306.

In the case at bar the justice had jurisdiction of the

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subject-matter and of the persons of the debtor and the garnishee. The garnishment was in no sense the foundation of the jurisdiction, but was merely ancillary to the main action and is a remedy given the creditor for the purpose of securing his demand. The garnishment bond served the purpose for which it was intended, and the judgment obtained through the proceedings, although irregular, was valid until directly assailed. The bond was executed and the writ of garnishment procured by appellee without the agency or consent of appellant, and had all the effect a valid bond could have. Appellee desired to arrest the payment of money to appellant by a third person, and, in order that he might do this, he voluntarily secured appellant. He accomplished that purpose and having done so he should not now be heard to repudiate the means by which he did accomplish it. He executed the bond in proceedings which he voluntarily instituted, and if, by means of the bond, loss or injury resulted to the obligee he is liable on the bond to the extent of the injury inflicted. The demurrer to the second paragraph of answer should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of answer.

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[No. 2,880. Filed October 23, 1900.]

MUNICIPAL CORPORATIONS.—*Proceedings of Council.—Members Present.—Passage of Ordinance.—Vote.—Street Improvements.*—In a proceeding to collect a street improvement assessment, the record of the proceedings of the common council shows that at the time the ordinance was passed, six members were present, presided over by the mayor, and the ordinance was adopted by a unanimous vote. At the next meeting of the council, when bids were received, the record shows that six councilmen were present, and does not show that any were absent. At a subsequent meeting when a final estimate was ordered, the record shows that five members were present and one absent. At other meetings when the street improvement was considered, the record shows that the six councilmen were present or one of them absent, and no other councilmen

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are mentioned as being present or absent. *Held*, that the record conclusively shows that the city council was composed of six members, and that the ordinance was passed by a two-thirds vote of all the members of the council. *pp.* 386, 387.

MUNICIPAL CORPORATIONS.—Street Improvements.—Collection of Assessments.—Complaint.—Precept.—Partial Estimate.—A complaint by precept to enforce the collection of a street improvement assessment is not bad for failing to show that the work was completed, since under §3627 Burns 1894, partial estimates may be made and enforced. *pp.* 387, 388.

SAME.—Street Improvements.—Plans and Specifications.—Complaint. A complaint for the collection of a street improvement assessment is not bad for failure to show that the council adopted the plans and specifications for the improvement, where the ordinance provides for the plans and specifications, and fully describes the character and nature of the improvements. *p.* 389.

SAME.—Street Improvements.—Collection of Assessments.—Evidence.—Record of Proceedings.—The record of the common council relative to a street improvement from the passage of the ordinance to and including the final estimate of the engineer is admissible in evidence in an action to enforce the collection of a street improvement assessment. *p.* 389.

SAME.—Street Improvements.—Collection of Assessments.—Evidence.—Harmless Error.—In an action for the collection of a street improvement assessment the admission in evidence of the record entry of the council, showing an allowance and order of payment to the contractor for the city's portion of the cost of the improvement, was harmless error. *p.* 389.

SAME.—Street Improvements.—Collection of Assessments.—Evidence.—Compromise and Settlement.—In an action to enforce a street improvement assessment the testimony of another property owner along the street improved relative to a statement made to him by the contractor in regard to the completion of the improvement made in connection with a compromise and settlement between such parties, was properly rejected. *p.* 390.

SAME.—Street Improvements.—Collection of Assessments.—Evidence.—Civil Engineer.—Expert Testimony.—The evidence of the civil engineer relative to the manner in which a street improvement was made, was admissible in an action to enforce an assessment lien. *p.* 390.

JUDGMENTS.—Corrections.—Where a judgment for the collection of a street improvement assessment included the interest thereon to the date of the rendition of the judgment, and the clerk entered the same making it bear interest from the date of approval of final estimate, such error cannot be reviewed in a motion for a new trial, but should have been presented by motion to modify the judgment. *pp.* 390, 391.

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From the Tipton Circuit Court. *Affirmed.*

W. R. Oglebay and *J. L. Oglebay*, for appellant.

G. H. Gifford, *J. R. Coleman* and *R. B. Beauchamp*, for appellee.

WILEY, J.—This was a proceeding by precept to collect an assessment for a street improvement. When the precept was issued and delivered to the treasurer of the city, appellant, who was defendant below, appealed to the circuit court. The case was put at issue by answer and reply, and tried by the court, resulting in a finding and judgment for appellee. Motion for a new trial overruled.

Appellant's motion to strike out parts of the transcript (complaint), his demurrer to the transcript, and his motion for a new trial were each, respectively, overruled, and such rulings are challenged by the assignment of errors.

The transcript shows that the common council of the city of Tipton passed an ordinance providing for the improvement of a certain street; that at the meeting of the council at which the ordinance was passed six members of the council were present, all of whom voted for the passage of the ordinance; that the city engineer was instructed to advertise for sealed bids for the construction of the improvement; that at a subsequent meeting of the council the bids were opened and read; that the construction and improvement of the street was awarded to appellee; that a contract was made with him to do the work; that he gave bond to the approval of the council; that he entered upon the work of improvement; that the city engineer was directed to prepare a final estimate of the work; that he did so, and made report thereof; that said report was approved, and that the assessments were confirmed, and that the assessment against the property of appellant was fixed at a designated sum. The ordinance was introduced in the common council June 19, 1888, and the various steps taken as above indicated followed in their order. The approval and accept-

ance of the final estimate as shown by the precept were on December 4, 1888. On April 18, 1893, the common council made a *nunc pro tunc* entry so that the record might affirmatively, and in explicit terms, show that two-thirds of the common council voted for said ordinance on its original passage. These facts are all shown by the precept.

It is well to remark before entering upon a discussion of the questions discussed that the improvement was made under the provisions of §§3162, 3163, 3164 R. S. 1881, and the lien created by the assessments was sought to be enforced by §3165 R. S. 1881.

The first objection urged to the transcript, or complaint, as we will designate it in this opinion, is that it does not show that the ordinance was passed by a two-thirds vote of the common council. Appellee insists that this fact does affirmatively appear from the record, and, also, that if it does not appear from the original proceedings of the council, the defect was cured by the *nunc pro tunc* entry.

An examination of the original record or proceedings of the common council convinces us that it does affirmatively appear that two-thirds of the members of the common council voted for the passage of the ordinance. At the meeting of the council when the ordinance was passed, it is shown that six councilmen were present and that the meeting was presided over by the mayor. The following entry was made: "And now on motion the said ordinance is placed upon its final passage and adoption." "Councilmen. G. W. Boyer votes aye; J. A. Gleason votes aye; E. B. Martindale votes aye; S. J. Porter votes aye; Henry Lane votes aye; and F. M. Hancock votes aye, the vote being unanimous, said ordinance is unanimously adopted."

At the next regular meeting of the council, when the bids for the construction of the improvement were opened and the work awarded, the record shows that the mayor and the same six councilmen were present. The record does not show that any of the councilmen were absent. At the next

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meeting the roll call shows that five councilmen were present, and one absent. At a subsequent meeting, to wit, October 2, 1888, the roll call showed five members present and one absent. At this meeting the city engineer was ordered to make a final estimate of the work. At the meeting of December 4, 1888, the roll call showed five members present and one absent, at which meeting the final estimate of the city engineer was approved, etc. At the next meeting, December 18, 1888, the record shows that five councilmen, naming them, were present, and one councilman, naming him, was absent. At all the meetings of the council, at which the matter of improving the street in question was considered, the record shows that the same six councilmen were either present or one of them absent; no other councilmen are mentioned as being present or absent. We think, therefore, that the record shows conclusively that at the time the ordinance was passed and the various steps taken with reference to the improvement, the common council of the city of Tipton consisted of six members, and as the record shows that the ordinance providing for the improvement was passed by a unanimous vote of the council, and that six members were present, it is a sufficient answer to the position assumed by the appellant that it does not show that the ordinance passed by a two-thirds vote of all the members of the council. This conclusion renders it unnecessary for us to consider the question as to the right of the common council subsequently to make a *nunc pro tunc* entry reciting that more than two-thirds of all the common council voted for said ordinance, etc.

Another objection urged to the complaint is that it does not show the work was completed. We think a fair interpretation of the complaint is against this objection. But whether we are right in this conclusion or not can not avail appellant. The estimate made by the engineer is either a final or a partial estimate, and in either event the lien created thereby is binding and may be enforced.

By virtue of §3627 Burns 1894, §3164 R. S. 1881, the common council had the power to cause estimates to be made from time to time, and to require the same to be paid to the contractor; and the statute makes such assessments liens, etc.

In the case of *Bozarth v. McGillicuddy*, 19 Ind. App. 26, objection was made to the complaint that it did not aver that the work was done according to contract. The court, by Comstock, J., said: "The first objection urged by the appellant to the complaint is that it contains no allegation that the work was done according to contract, nor does it set out a copy of the contract. While the complaint does not, in words, aver that the work was done according to contract, it does aver that the contract was let, after the council had duly advertised for bids, to the lowest bidder, and that thereafter, to wit, on the 8th day of September, 1893, the common council ordered the engineer to make estimates of the work done on Napoleon street, and said engineer did make report and estimates in accordance with law for said work done on Napoleon street, and reported the same to the common council, and that said report was accepted; that the common council adopted the order or resolution making the assessments as reported by the engineer, etc."

The complaint does not, in express terms, aver that the work had been completed, but it shows that the exact amount of gravel provided by the ordinance was spread upon the street, and the common council ordered that a final estimate be made. It is not to be presumed that such order would have been made with the improvement in an unfinished condition. It will be presumed that the engineer and common council, nothing appearing to the contrary, did their duty, and that the estimates and assessments would not have been made unless the contract had been performed. There is nothing appearing in the record to indicate that the common council did not do its duty. This case upon the question is very similar to the *Bozarth-McGillicuddy* case, *supra*, and we refer to that case without further comment.

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Counsel for appellant urge also that the complaint is defective because it does not show that the common council did not adopt the plans and specifications for the improvement. This objection is not well grounded for the reason that the ordinance specifically provides for the plans and specifications and fully describes the character and the nature of the improvement.

There are twenty reasons assigned in the motion for a new trial. The first five reasons for a new trial rest upon the action of the court in admitting in evidence over appellant's objections the various parts of the record of the common council from the passage of the ordinance down to and including the final estimate of the engineer. These proceedings were the basis of appellee's cause of action, and there was no error in admitting them in evidence.

The sixth reason for a new trial was for alleged error in admitting in evidence the record entry of the common council showing an allowance and an order of payment to the contractor for the city's portion of the cost of the improvement, and the seventh for the overruling of appellant's motion to strike out such evidence. This evidence was not essential to establish appellant's right to recover, and if we concede that it was error to admit it, it was harmless error. It could not have prejudiced appellant, and harmless error is not a ground for reversal. The eighth reason for a new trial was the action of the court in admitting in evidence the record of the proceedings containing the notice for bids for the improvement. This was competent evidence, for it was one of the steps in proceedings of that character required by statute. There was no error in admitting it.

In the ninth reason for a new trial appellant alleges that the court erred in admitting in evidence the *nunc pro tunc* entry of the common council, to which we have above referred. As we have stated, this *nunc pro tunc* entry was unnecessary, and hence it could not aid appellee in his right to recover. Neither could it harm appellant.

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The tenth and eleventh reasons for a new trial are alleged errors of the court in admitting in evidence the affidavit and order for the precept and the precept itself. The record shows these were in strict conformity to the statute, and hence there was no error in admitting them.

By the thirteenth reason for a new trial, appellant contends that the court erred in refusing to allow one Langman to testify to a statement alleged to have been made to him by appellee in regard to the completion of the street after the final estimate was made. It is shown by the evidence that Langman owned real estate abutting on the street improved, and he and appellee had met for the purpose of making a compromise and settlement of the amount due appellee on the assessment, and that the statement made by the appellee to Langman was made in connection with such compromise and settlement. Under the rule in this State, the statement was properly excluded.

The fourteenth, fifteenth, sixteenth, and seventeenth reasons for a new trial relate to the admission of certain evidence of one Huron, in regard to the manner in which the street was improved under the ordinance and contract, etc. Huron was the civil engineer at the time the work was done, and had charge of it. The questions were propounded to him as an expert, and related to the manner in which the work was done, and, we think, were proper.

The nineteenth and twentieth reasons for a new trial are that the decision of the court is not sustained by sufficient evidence and is contrary to law. A careful examination of the whole record shows that there is ample evidence to sustain the decision of the trial court, and that it is not contrary to law.

The eighteenth reason for a new trial is that the amount of recovery is erroneous, being too large. The precept shows that there was assessed against appellant's lot the sum of \$54.94, with six per cent. interest from December 4, 1888, when the final estimate was approved. Interest at

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six per cent. from that date to the date of the finding, to wit, October 2, 1897, \$28.94. This, added to the original assessment, makes \$83.88, the amount of the finding, and for which judgment was rendered. The question which appellant by this reason for a new trial seeks to raise is not presented in a manner that we can take notice of it. The finding of the court was for \$83.88, being the exact amount then due. The judgment follows the finding, but in entering it the clerk wrote it so as to make it bear interest from December 4, 1888, when the final estimate was approved and the assessment confirmed.

A motion for a new trial goes to the verdict of the jury or the finding of the court, and not to the judgment. A proper way to present this question would have been by a motion to modify the judgment. This has not been done, and hence the question is not before us for decision. There is no error in the judgment, and it is affirmed.

WHITELEY MALLEABLE CASTINGS COMPANY ET AL. v.
BEVINGTON.

[No. 2,990. Filed October 24, 1900.]

PLEADING.—Harmless Error.—Sustaining a demurrer to a paragraph of answer is harmless, where all the material allegations thereof were contained in an amended answer by way of counterclaim. *p. 393.*

SAME.—Answer.—Payment.—Release.—Where a general denial and plea of payment were pleaded, a demurrer was properly sustained to a paragraph of answer alleging that plaintiff for a valuable consideration released to defendant the cause of action sued upon. *p. 393.*

SAME.—Counterclaim.—In an action for money had and received defendant filed a counterclaim based upon a promissory note indorsed by payee and defendant, filed as an exhibit, alleging that the note was indorsed by the payee to defendant and "is now held by him," and at the solicitation of the maker, for the purpose of giving him credit, defendant indorsed the note and plaintiff received from the maker the amount named. *Held*, that the averments of the pleading, taken with the exhibit, are not sufficient to show a right of action in defendant as indorsee for value from the payee of the note, or as a surety who had paid the note for the maker. *pp. 393, 394.*

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A motion for a new trial goes to the verdict of the jury or the finding of the court, and not to the judgment. A proper way to present this question would have been by a motion to modify the judgment. This has not been done, and hence the question is not before us for decision. There is no error in the judgment, and it is affirmed.

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PLEADING.—Answer.—Counterclaim.—Exemptions.—Where in an action on account defendants filed answers of set-off and counterclaim, and in the counterclaim alleged a promise on the part of plaintiff to execute a chattel mortgage on certain specified personal property to secure one of defendants as indorser, a reply thereto that plaintiff was a householder, and that all of his property was less in value than \$600, was good against demurrer, it not appearing that the property claimed as exempt was the property to be included in the mortgage, or that all of the defendants have any right to a specific performance of the promise. *p. 394.*

VERDICT.—Judgments.—A verdict finding for plaintiff on his complaint in the sum of \$84.51, and for defendants on their set-off and counterclaim for \$200, and that plaintiff was entitled to have the amount assessed to him allowed to him under the exemption laws, as prayed for, is not double, since it was the duty of the jury to find upon the issues presented by the pleadings, and it was the duty of the court to give plaintiff judgment for \$84.50, and that he hold the same exempt from execution. *pp. 394, 395.*

NEW TRIAL.—Joint Motion.—A joint motion for a new trial on account of the insufficiency of the evidence to sustain the verdict against defendants was properly overruled where the evidence was sufficient to sustain the verdict against any one of defendants. *p. 395.*

From the Delaware Circuit Court. *Affirmed.*

Frank Ellis, J. T. Walterhouse, J. W. Ryan and W. A. Thompson, for appellants.

ROBINSON, C. J.—Appellants appeal from a judgment against them for money had and received for appellee's use.

The complaint avers that the Whiteley Malleable Castings Company operates a large factory; that Elmer J. Whiteley and Burt H. Whiteley are officers, agents, and managers of the business and interested therein; that in conducting such business it was necessary to employ a large number of men and for such men to board and lodge near the factory; that for such reasons appellants induced appellee to open a boarding house near the factory, and agreed and were authorized by appellee to collect from and retain out of the wages of employes lodging with appellee such sums as might become due on that account and pay the same to appellee as soon as collected; that pursuant to this arrange-

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ment appellee lodged certain employes named who were indebted to him in named sums, which appellants collected and refused to pay to appellee.

Appellants answered in six paragraphs, also an amended answer by way of counterclaim, and appellant, B. H. Whiteley, filed a separate counterclaim and cross-complaint. A demurrer was sustained to the amended first and sixth paragraphs of answer and the amended counterclaim and cross-complaint of B. H. Whiteley.

The first question discussed is sustaining appellee's demurrer to the amended first paragraph of appellants' answer. Even if this ruling was erroneous it did not harm appellants because all the material allegations in this paragraph are contained in appellants' amended answer by way of counterclaim. In *Luntz v. Greve*, 102 Ind. 173, it is said: "We suppose it to be immaterial what name is given a pleading, provided it be of such a character as to secure the party the full benefit of the matters pleaded in another form." *Moore v. Boyd*, 95 Ind. 134; *Johnson v. Putnam*, 95 Ind. 57.

The amended sixth paragraph of answer reads: "For their amended further and sixth paragraph of answer to plaintiff's complaint, defendants say that, for a valuable consideration, plaintiff has released to defendants the cause of action sued upon." The demurrer to this paragraph was properly sustained. It was pleaded in bar, and, conceding, without deciding, that the words "has released" would be sufficient without stating the manner of the release, it is readily seen that it is not good as a plea in bar. If it means payment, payment was already pleaded; if it means a denial of any liability, the general denial had been pleaded.

It is difficult to tell upon what theory the counterclaim and cross-complaint of B. H. Whiteley proceeds. A note executed by appellee payable to D. M. Birney, and on which, following the word indorsed, are the names of B. H.

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Whiteley and D. M. Birney, is filed as an exhibit. It is averred that the note was indorsed by the payee to Whiteley and "is now held by him", and it is also averred that at the solicitation of the maker of the note, and for the purpose of giving him credit for the borrowing of the money with which to open the boarding house mentioned in the complaint, Whiteley indorsed the note for the maker, who received from the payee the amount named. The averments of the pleading taken with the exhibit are not sufficient to show a right of action in Whiteley as an indorsee for value from the payee of the note. Nor are the averments sufficient to show a right of action in Whiteley as a surety who had paid the note for the maker. Upon either theory the demurrer was properly sustained.

The second paragraph of appellee's reply to the fourth and fifth paragraphs of answer and to appellants' counterclaim sets out that appellee is a resident householder all of whose property is less in value than \$600. The fourth and fifth paragraphs of answer pleaded set-off. The counterclaim undertakes to plead, among other things, a promise on the part of appellee to execute a chattel mortgage on specified personal property, to secure a certain note executed by appellee and indorsed by appellant B. H. Whiteley and payable to one Birney, the mortgage to be executed to Birney and Whiteley. The pleading does not show how all the appellants have any rights to a specific performance of the promise, nor does it appear that the property claimed as exempt in the reply is the same or any part of the personal property which was to be included in the mortgage. To the answers and to that part of the counterclaim which is well pleaded the reply was good against the demurrer.

The issues joined were tried by a jury, who returned the following verdict: "We the jury find for the plaintiff on his complaint on the issues thereon, against the defendants, and assess his damages thereon at the sum of \$84.51, and we find for the defendants on their set-offs and counterclaim

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against the plaintiff and assess their damages thereon at the sum of \$200. And we find for the plaintiff on his second paragraph of reply against the defendants, and that he is entitled to have said amount assessed to him on his complaint and allowed to him under the exemption laws of the State of Indiana as prayed for thereon."

We do not agree with counsel that the verdict is double. Upon the verdict it was the court's duty to give appellee judgment for \$84.50, and that he hold the same exempt from execution and from being applied to the payment of any part of the amount found against appellee and in appellants' favor. It was also the court's duty to render a judgment upon the verdict in appellants' favor for \$200. This the court did. It can not be said there are two separate verdicts. It was the jury's duty to find upon the issues presented, and whether appellee was entitled to an exemption depended upon the facts submitted to the jury.

It is argued that the verdict is not sustained by sufficient evidence, and is contrary to the evidence. Appellants all joined in a motion for a new trial. The only question argued is that there is no evidence to sustain a verdict against E. J. Whiteley and B. H. Whiteley. It is not claimed there is no evidence to support a verdict against appellant company. As the motion is joint it could not be sustained if there was evidence to sustain the verdict against any one of appellants. There was evidence as against appellant company, and the other appellants could present the question as to themselves only by filing a separate motion for a new trial. This they did not do. Judgment affirmed.

BROWNELL v. IRWIN ET AL.

[No. 3,207. Filed October 24, 1900.]

NUISANCE.—Complaint.—Misjoinder of Parties.—In an action by two plaintiffs for the abatement of a nuisance, a complaint which expressly alleges that the plaintiffs were severally injured in sums specified is insufficient for want of sufficient facts.

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From the Miami Circuit Court. *Reversed.*

Milton Kraus, for appellant.

H. M. Haag, for appellees.

BLACK, J.—The complaint of the appellees, Mary A. Irwin and Emma Miller, against the appellant consisted of three paragraphs which were severally assailed for want of sufficient facts by a demurrer which was overruled. In each paragraph it was sought to set up a cause of action for a nuisance occasioned by the depositing by the appellant of a large quantity of ashes upon certain premises, being the east one-half of a certain lot, in the possession of the appellant. The injury therefrom alleged in the first paragraph was the pollution of a well of water by percolation. In the second paragraph the injury alleged was the damage of a dwelling-house situated on the west one-half of said lot, in that one side of the house was marred and soiled by ashes blown against it, the paint and putty thereby being caused to scale off. In the third paragraph it was stated that portions of the ashes went into said house and settled on the furniture and food and that fire accompanying the ashes threatened the burning of the house.

The complaint in each paragraph is obscure through meagerness of averments showing interest of the appellees in the injured property and their relative position to each other. The uncertainty in this regard is so great, and may be so easily remedied by a full and explicit statement of facts without conclusions of law, as the code expressly requires, that under the view which we take of the pleading in another respect we will not further advert to this matter.

It is well settled—so well that authorities need not be cited—that upon demurrer for want of sufficient facts a complaint will be held insufficient if it fail to show a cause of action in all the plaintiffs in which they may properly join as such.

In each of the paragraphs before us there is a failure to

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show a joint cause of action in the plaintiffs, in that the damages alleged are expressly averred as damages sustained by the plaintiffs severally.

In the first paragraph it was stated that each of the plaintiffs had been greatly injured by reason of the privation of the use of said well of water, "the plaintiff Mary A. Irwin being damaged to the sum of \$200, and the plaintiff Emma Miller being damaged in the sum of \$200, the plaintiff Emma Miller being also damaged in health and comfort, by reason of said plaintiff's deprivation of the use of said well of water to the sum of \$300; therefore, the plaintiff Mary A. Irwin claims \$200, and the plaintiff Emma Miller claims \$500 damages."

In the second paragraph it was stated that the house in question had been damaged as above described, "to the damage of each of the plaintiffs in the sum of \$100 each."

In the third paragraph it was stated that the alleged nuisance "has lessened the personal enjoyment of the plaintiff Mary A. Irwin and deprived her of the full comfort of said plaintiffs' property, to her damage in the sum of \$200, and has lessened the personal enjoyment of the plaintiff Emma Miller, and deprived her of the full comfort of said plaintiff's property, to her damage in the sum of \$500." Prayer that the nuisance be abated, and "that plaintiff Mary A. Irwin recover said sum of \$500 damages, and that plaintiff Emma Miller recover said sum of \$1,100 damages thereby; and all proper relief."

Whatever may be allowable in equity, those proceeding as plaintiffs at law who have been severally damaged by the same nuisance, which may occur by reason of their distinct rights in relation to real estate being injuriously affected by the nuisance, must bring separate actions. While the interests of the appellees are not clearly indicated in the complaint before us, the plaintiffs are expressly alleged to have been injured severally. Therefore each paragraph should have been held insufficient on demurrer.

Judgment reversed.

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DOUGHERTY ET AL. v. WISE ET AL.

[No. 3,149. Filed October 25, 1900.]

JUDGMENT.—*Action to Set Aside Default.*—*Defect of Complaint in Original Action not Cured by Judgment.*—On appeal in an action to set aside a judgment taken by default, a fatal defect in the complaint in the original action is not cured by the finding of the court, since no trial was had.

From the Marion Superior Court. *Affirmed.*

A. F. Denny, for appellants.

W. W. Herrod and *W. P. Herrod*, for appellees.

COMSTOCK, J.—The complaint in this action asks for a reversal of a judgment upon default rendered by the Marion Superior Court against appellees, in favor of appellants, upon the ground that the complaint in said action did not state facts sufficient to constitute a cause of action against appellee Wise.

In the action upon which judgment was rendered, appellant Dougherty sought to recover judgment against the appellees upon a building contract and a bond executed by appellees Leonard as principal and Wise as surety, to secure its faithful performance.

In the case at bar the trial court overruled appellants' demurrer to the complaint, and, upon appellants' refusal to plead further, it was adjudged that the judgment in the original action be reversed and in all things set aside, rendered null and void, and that the appellees recover costs.

The only question presented by this appeal is the sufficiency of the complaint upon the bond. The complaint sets out as exhibits the contract for the building and the bond to secure its performance. The contract entered into by appellants and appellee Leonard stipulated that Leonard was to build and complete the house therein provided for on or before April 1, 1897. The bond, made an exhibit, and by virtue of which it was sought to hold Wise, appellee, as

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surety, is conditioned for the completion of a building to be erected by Leonard for the appellants on or before March 15, 1897.

The complaint does not allege that any mistake or change authorized by the surety was made in the dates, and none will be inferred. The bond does not provide for the failure to perform the contract in suit. This variance we deem fatal to the complaint. Counsel for appellants meet this objection with the proposition that this defect should be deemed as cured by the evidence.

It is said by Reinhard, J., speaking for the court in *Sloan v. Faurot*, 11 Ind. App. 689: "When the appeal is from a judgment taken by default, the rule that the complaint will be held sufficient unless there is an entire failure to state a cause of action does not apply. The rule appears to be, in such cases, that if the complaint is not such as would withstand a demurrer it may be first assailed by an assignment of errors in this court. Elliott's App. Proc., §475, and cases there cited; *Cleveland, etc., R. Co. v. Tyler*, 9 Ind. App. 689. In such a case the defects in the complaint can not be said to be cured by the verdict or finding for the ample reason that no trial has been had."

To the foregoing expression upon the question we deem it unnecessary to add anything. Appellees have filed and argued a motion to dismiss this appeal, and insist that the complaint in the original cause is defective upon other grounds than the one considered. The conclusion reached renders it unnecessary to consider the other questions thus raised. The judgment is affirmed.

Henley, J., absent.

BUSCHER ET AL. v. VOLZ ET AL.

[No. 8,189. Filed October 25, 1900.]

PLEADING.—*Parties.*—*Cross-Complaint.*—A cross-complaint by part of defendants, in an action on a promissory note, against the other defendants to recover from cross-defendants certain attorney's fees for which cross-plaintiffs were liable, and which cross-defendants by way of compromise and settlement of the original action had agreed to pay, is bad on demurrer, since the matters alleged therein are not germane to the complaint, and do not in any way affect the subject-matter of the original action.

From the Tipton Circuit Court. *Reversed.*

J. R. Coleman, G. H. Gifford and M. T. Sheil, for appellants.

J. M. Fippen and J. M. Purvis, for appellees.

WILEY, J.—Appellants and appellees were partners, doing business in the name of The Citizens Gas and Oil Company of Atlanta, Indiana. Said company, or firm, as it is designated in the record, became indebted to one Martz on a promissory note executed by appellant Buscher as president, and when said note became due the payee brought an action thereon against all the members of said firm. Five of the defendants to that action appeared, employed counsel, and made defense. The cause was put at issue and set for trial December 3, 1898. Prior to that date, by an arrangement between the members of the partnership and the plaintiff, the case was compromised. The day before the case was set for trial, to wit, December 2, 1898, the five members of the firm who made a defense to the original action filed a cross-complaint against their codefendants, appellants here, numbering sixty-one in all, to recover from them \$15 for attorneys' fees for which they were liable to the attorneys whom they had employed, and which the cross-complaint avers appellants agreed to pay. These facts all appear in the cross-complaint. The cross-complaint avers

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that appellees paid to the appellants certain sums of money, being in the aggregate \$69.50, and then follow these averments: "And by way of compromise and in consideration of the said amount by cross-plaintiffs, cross-defendants then and there agreed, promised, and contracted to pay to Fippin and Purvis an attorney fee of \$15, contracted by cross-plaintiffs in their said defense as against William Martz' cause of action, said payment to be made before the day this cause was set for trial, and cross-complainants agreed as a part of said consideration that Gifford and Coleman, attorneys for cross-defendants, should be paid by said firm also." The cross-complaint avers a refusal and failure to pay, and demands judgment.

Appellants demurred to the cross-complaint for want of facts; the demurrer was overruled and exceptions reserved. The cause was put at issue by answer and reply, and tried by jury, resulting in a verdict and judgment for appellees. Appellants' motion for a new trial was overruled.

By the assignment of errors, the overruling of the demurrer to the cross-complaint and the motion for a new trial are before us for review.

The original complaint under which the cross-complaint was filed is not in the record, and all we know about it is what is stated in the cross-complaint. From this, we are advised that the original complaint declared upon a promissory note executed by the president of "The Citizens Gas and Oil Company of Atlanta," to one William Martz, for borrowed money for the use and benefit of the company. Martz sued all the members of the company, or firm, upon this note, and the firm was composed of cross-plaintiffs and cross-defendants. The cross-complaint avers that, pending that action, the cross-plaintiffs appeared, employed counsel, and prepared to defend; that a compromise was made between cross-plaintiffs and cross-defendants, by which the Martz note was to be paid, and that cross-defendants agreed

to pay Fippin and Purvis the attorneys' fee contracted by cross-plaintiffs.

Our first inquiry will be directed to the sufficiency of the cross-complaint, and this suggests an investigation as to the nature and object of such a pleading. Our code does not provide for a cross-complaint, but the chancery practice of determining the rights of the parties on each side of a case is recognized by our decisions, and in such cases the rules of pleading and practice of chancery courts, as modified by the spirit of the code, govern. *Heaton v. Lynch*, 11 Ind. App. 408. A cross-complaint, under the code system of practice, is in its nature and object substantially equivalent to the cross-bill in equity, so far as that pleading is used to obtain affirmative relief. 5 Ency. Pl. & Pr., 674. It is a rule of chancery practice followed in the federal courts and most of the state courts that matters set up in a cross-bill must be germane to the matters involved in the original bill of complaint. 5 Ency. Pl. & Pr., 640, and cases there cited. Of the many states where this rule is followed, we cite the following: Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Michigan, etc.

It is also the rule well grounded by the authorities, that the new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such and such only as are necessary for the court to have before it in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it, in respect to the cause of action upon which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this and to introduce new and distinct matter not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against the complainant or one or more of his codefendants, his pleading will not be a cross-bill but an original matter.

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Krueger v. Ferry, 41 N. J. Eq. 432, 5 Atl. 452; *Galatin v. Erwin*, Hopk. Ch. (N. Y.) 48; *Carpenter v. Gray*, 37 N. J. Eq. 389; *Andrews v. Kibbee*, 12 Mich. 94; *Farmers, etc., Bank v. Bronson*, 14 Mich. 360. And in such case no decree can be rendered on such new matter. See 5 Ency. Pl. & Pr., 641, and note 2. And, as under the code practice, so in jurisdictions where cross-complaints are authorized by statute, or recognized by the practice, the relief sought by the cross-complaint must affect, or be affected by, the subject-matter of the action; or relate to or depend upon the contract or transaction upon which the action was instituted affecting the property to which the action relates. 5 Ency. Pl. & Pr., 674. See, also, 5 Ency. Pr. & Pl., 678, and authorities there cited.

In *Williams v. Boyd*, 75 Ind. 286, it was held that the cause of action set forth in a cross-complaint must arise upon or grow out of the cause of action stated in the original complaint, and not be independent thereof. See, also, *Washburn v. Roberts*, 72 Ind. 213; *Heaton v. Lynch*, 11 Ind. App. 408; *Sterne v. Bank*, 79 Ind. 560; *Hunter v. McLaughlin*, 43 Ind. 38; *Pool v. Davis*, 135 Ind. 323; *Eve v. Louis*, 91 Ind. 457, 469; *Maning v. Gasharie*, 27 Ind. 399.

It is a plain proposition from the allegations of the cross-complaint that the matter therein sought to be determined between cross-plaintiffs and cross-defendants (they all being defendants in the original action) are not germane to the complaint, nor do such matters in any way affect the subject-matter of the original action.

Another objection to the cross-complaint is that it declares upon a promise of the cross-defendants to pay to Fippin and Purvis an obligation of the cross-plaintiffs incurred by them in the employment of Fippin and Purvis as their attorneys in the original action. It is not alleged that the cross-plaintiffs had discharged their obligation to their attorneys by payment of the fee agreed upon, and it neces-

sarily follows that they have not been damaged by the failure of the cross-defendants (appellants) to pay. A judgment of recovery by appellees against appellants would not bar an action by Fippin and Purvis against appellants on their promise, for two reasons: (1) They were not made parties to the cross-complaint, and hence their rights could not be adjudicated in such proceeding; (2) because the rule is firmly settled in most of the states that a third party for whose benefit a contract is made may sue upon it in his own name. This rule has found favor in this State in many cases.

In *Clodfelter v. Hulett*, 72 Ind. 137, on p. 141, it was said: "It has been many times decided that a promise made by one to another, from whom the consideration moves, for the benefit of a third, may be sued on by the party for whose benefit the promise was made." See, also, *Raymond v. Prichard*, 24 Ind. 318; *Davis v. Calloway*, 30 Ind. 112; *Josselyn v. Edwards*, 57 Ind. 212; *Campbell v. Patterson*, 58 Ind. 66; *Carter v. Zemblin*, 68 Ind. 436; *Fisher v. Wilmoth*, 68 Ind. 449; *Stevens v. Flannagan*, 131 Ind. 122; *Leake v. Ball*, 116 Ind. 214; *Carnahan v. Tousey*, 93 Ind. 561.

By this cross-complaint appellees seek a recovery against appellants on their own promise to pay Fippin and Purvis. Suppose they succeed, collect the judgment, and then fail to pay the money over to the beneficiaries. True this would not cancel their primary liability to Fippin and Purvis, nor would it relieve appellants from liability under their promise. An elaboration of this proposition would be useless.

The court erred in overruling the demurrer to the cross-complaint. This conclusion makes it useless to review the ruling on the motion for a new trial. Judgment reversed, and the court below is directed to sustain appellants' demurrer to the cross-complaint.

Henley, J., not present.

Ward v. Pittsburgh, etc., R. Co.

WARD v. THE PITTSBURGH, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.

[No. 8,221. Filed October 26, 1900.]

PLEADING.—*Landlord and Tenant.*—*Action for Possession.*—*Defense.*

—*Answer.*—In an action by a landlord to recover possession of real estate and damages for its unlawful detention, all matters of defense, except such as may not be given in evidence without plea in civil cases before justices of the peace, may be made available without being pleaded, and available error cannot be predicated upon the action of the court in sustaining a demurrer to an answer in such case asserting ownership of the leased premises and that the lease was procured through coercion.

From the Porter Circuit Court. *Affirmed.*

O. J. Bruce and M. M. Bruce, for appellant.

N. O. Ross and G. E. Ross, for appellee.

BLACK, J.—The appellee brought, in the court below, the landlord's statutory action for the recovery of the possession of certain real estate, and damages for detention, against the appellant alleged to be unlawfully holding over after notice to quit for non-payment of rent.

There was an answer in a single paragraph denying the landlord's title and asserting the appellant's ownership in fee simple at the time of the execution of the lease and thereafter, and also containing allegations which in argument here the appellant contends should be regarded as showing that the execution of the lease was procured through coercion.

The court sustained a demurrer to this answer, and without further answer the cause was tried by the court, the finding upon the evidence being in favor of the appellee.

The action of the court in sustaining the demurrer to the answer is assigned as error.

In such an action, whether commenced before a justice of the peace or in the circuit court, all matters of defense, except such as may not be given in evidence without plea in

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civil cases before justices of the peace, may be made available without being pleaded. §§7107, 7110 Burns 1894, §§5226, 5229 Horner 1897; *Poffenberger v. Blackstone*, 57 Ind. 288; *Epstein v. Greer*, 78 Ind. 348; *Smith v. Pinnell*, 143 Ind. 485; *Elliott v. Stone City Bank*, 4 Ind. App. 155; *Hamline v. Engle*, 14 Ind. App. 685.

In civil actions before justices of the peace, all matters of defense except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea; matter in abatement must be pleaded under oath, and the execution or the assignment of a written instrument sued on may not be denied except by special plea verified by affidavit. §1528 Burns 1894, §1460 Horner 1897.

Whether or not the appellant's answer contained a sufficient defense, there could be no available error in sustaining the demurrer. If, as contended in argument, the facts pleaded constituted coercion, they could have been made as available on the trial without any pleading on behalf of the appellant as they could have been if the demurrer had been overruled.

If any of the appellant's rights in the premises were abridged on the trial, the matter has not been brought to our attention. Judgment affirmed. Henley, J., absent.

HARTFORD LIFE INSURANCE COMPANY v. BRYAN.

[No. 8,280. Filed October 26, 1900.]

ACTION.—Demand.—Suit on Contract for Wages.—In an action for wages due under a contract it is not necessary that the complaint allege a previous demand, since the suit constitutes a sufficient demand. *p. 408.*

ATTACHMENT.—Quashing Writ.—Complaint.—Attachment proceedings are merely ancillary to the main action, and the quashing of the writ of attachment does not carry with it the complaint. *p. 408.*

APPEARANCE.—Judgment.—Where in an action against a foreign corporation on account and in attachment defendant appeared to the main action and filed answer, such appearance gave the court power to render a personal judgment. *p. 408.*

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TRIAL.—*Jury*.—An action on account and in attachment is properly submitted to a jury for trial, since the attachment is not the foundation of the action. *p. 409.*

VERDICT.—*Uncertainty*.—*Description of Property*.—In an action on account and in attachment a verdict for plaintiff in a named sum, and that he was entitled to have the property attached sold, without specifically describing the property, is not so uncertain that a judgment cannot be pronounced upon it. *p. 409.*

From the Marion Superior Court. *Affirmed.*

E. A. Brown, O. H. Carson and J. C. Moore, for appellant.

H. J. Milligan, for appellee.

ROBINSON, C. J.—Appellee sued for wages alleged to be due under a contract.

The verified complaint and an affidavit that appellant is a foreign corporation were filed April 22nd. On April 27th, appellant appeared specially and moved to quash the writ of attachment because of insufficient bond. April 28th the court approved an additional undertaking, and overruled the motion to quash. On April 30th appellant moved to strike out the complaint and affidavit and quash the writ. May 25th, the court overruled the motion to strike out the complaint, and sustained the motion to quash the writ. May 28th appellee filed an affidavit for attachment and an affidavit of non-residence of appellant, and the court ordered publication for September 5th. June 1st appellant moved to strike out the affidavit and dissolve the attachment issued as of date May 28th. June 4th appellee filed an additional bond and the court overruled the motion to strike out the affidavit and dissolve the attachment issued May 28th. On September 28th appellant entered a general appearance and answered by general denial. Cause submitted to a jury over appellant's objection and verdict for appellee. Motions for a new trial and in arrest overruled, and judgment on the verdict.

The errors assigned question the sufficiency of the complaint, overruling appellant's motion to strike out the com-

plaint, the motion to strike out the affidavit in attachment and dissolve the attachment, in submitting the cause to a jury for trial, overruling the motions for a new trial, and in arrest.

It is argued that the complaint is bad for failing to aver a demand. It is well settled that when money is due on a contract the suit constitutes a sufficient demand. *Olvey v. Jackson*, 106 Ind. 286, and cases cited; *Bertha v. Sparks*, 19 Ind. App. 431. See, also, *Ferguson v. State*, 90 Ind. 38.

No reason has been pointed out why the complaint should have been stricken out when the writ of attachment was quashed. The quashing of the writ did not carry with it the complaint. After the writ is quashed any further proceedings under it are void; but the attachment proceedings are merely ancillary to the main action. The court might lose jurisdiction of the person when the writ is quashed, but that would not prevent further proceedings under the complaint. The statute permits a plaintiff, at the time of filing his complaint, or at any time afterward, to have an attachment in certain specified cases. When he does ask for attachment he must file an affidavit and bond, and upon these the writ issues. §§925, 928, 929, 930 Burns 1894.

A bond in attachment was approved April 28th. It is not claimed this bond was insufficient. When the writ was quashed the bond still remained on file. With a sufficient affidavit and this bond another writ might be issued. The record recites that an additional bond was filed, although it is not set out in the record, but whether it was a sufficient bond is immaterial as the first bond was still on file. The writ follows the filing of the affidavit and bond. The affidavit for attachment showed the nature of the claim, that it is just, the amount appellee ought to recover, and that appellant is a foreign corporation. An affidavit of non-residence was also filed, and publication had. But to the main action appellant appeared and answered, and this gave the court power to render a personal judgment. §393 Burns 1894.

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There was no error in submitting the cause to a jury. The attachment was not the foundation of the action. The suit was on an account.

It is argued also that the verdict is not sufficient to support a judgment in that it does not describe the property attached. When appellant entered a general appearance the suit was mainly an action *in personam* with the added incident that the property attached, which was then under the control of the court, should be liable for the final judgment rendered by the court. The jury found for appellee in a named sum, and that he was entitled to have the property attached sold, but did not specifically describe it. The judgment particularly describes the property, and orders it sold, or so much as may be necessary to pay the debt. A verdict, however informal it may be, is good if the court can understand it. The jury found that appellee was entitled to have the attached property sold. The court, in its judgment, directs this attached property, particularly described, to be sold. The verdict is not so uncertain that a judgment can not be pronounced upon it. See 3 Work's Prac. 448; *Garrett v. State*, 149 Ind. 264.

Judgment affirmed. Henley, J., absent.

THE CITY OF INDIANAPOLIS v. MORRIS.

[No. 3,097. Filed October 30, 1900.]

TAXATION.—Refunding Taxes Erroneously Assessed.—Statutes.—Repeal by Implication.—The provision of §29 of the act of 1891 (Acts 1891 p. 153) that the assessment of property and the collection of taxes shall be made as now provided by law, and that all real estate not exempt from taxation, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes, does not repeal by implication §3157 R. S. 1881 giving the common council power to refund taxes erroneously assessed. pp. 411, 412.

SAME.—Refunding Taxes Erroneously Assessed.—Statutes.—Repeal.—The act of 1891 (Acts 1891, p. 398) repealing §3261 R. S. 1881, exempting farm lands from municipal taxation for certain purposes, providing that such repeal shall not affect pending litigation, does not

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exclude others from instituting suits after such repeal for the recovery of taxes erroneously collected on such farm lands before the repeal of the statute. *pp. 412, 413.*

TAXATION.—*Taxes Erroneously Assessed.*—In an action to recover taxes paid upon property which was exempt from taxation for certain purposes, under §3261 R. S. 1881, it is immaterial whether the payment was made voluntarily or involuntarily. *p. 413.*

SAME.—*Farm Lands in City.—Recovery of Taxes Erroneously Collected.*—Plaintiff was the owner of a fourteen acre tract of land lying within the corporate limits of a city, and sought to recover taxes erroneously assessed and collected thereon. It appeared that the owner conveyed two lots of the land to his sons who built houses thereon, and two houses in addition were built on another portion thereof. The remainder of the tract, consisting of about thirteen acres, was separately inclosed, near the center of which was situated the dwelling-house of plaintiff, a stable, and a lawn 200 feet wide extending to the street. The remainder of the land was used for meadow and pasture. *Held*, that the property was farm land within the meaning of §3261 R. S. 1881, and should not be taxed at a higher rate than other farm land in the civil township. *pp. 413, 414.*

SAME.—*Farm Lands in City.—Repealed Statute.*—Section 3261 R. S. 1881 (Repealed in 1891) relative to taxation of farm lands lying within the corporate limits of a city means that such lands shall not be taxed by the city for general city purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes. *pp. 414-416.*

From the Marion Superior Court. *Affirmed.*

J. W. Kern and J. E. Bell, for appellant.

F. H. Blackledge, for appellee.

COMSTOCK, J.—Appellee sought to recover in the court below certain taxes which he claimed were erroneously assessed and collected by appellant for the years 1888 and 1890 on a tract of land situate within the corporate limits of the city of Indianapolis, containing more than five acres, and not used for other than agricultural purposes. He sought to recover the difference between the rate levied upon said lands within the corporate limits and the rate upon farm lands lying in Center township but outside of the corporate limits of said city. He bases his right to recover on

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§3261 R. S. 1881. The method of recovery is provided in §3157 R. S. 1881.

The trial court rendered judgment for appellee for the taxes for the year 1888 and in favor of appellant for the year 1890. Appellant assigns as error (1) the action of the court in overruling its demurrer to appellee's complaint; (2) in overruling its motion for a new trial. For cross-error appellee says that the court erred in overruling his motion for a new trial. Counsel for appellant insist that the judgment of the trial court should be reversed because (1) the statute exempting farm lands, as well as the statute giving a remedy for taxes erroneously assessed and voluntarily paid, were both repealed prior to the commencement of this action; (2) the taxes appellee seeks to recover were voluntarily paid; (3) the land was used for other than agricultural purposes and was improved with valuable improvements; (4) the evidence furnishes no basis upon which to estimate the amount of recovery; (5) if under any circumstances appellee could recover, it could only be for the actual difference between the general city rate and the township rate; (6) of the taxes paid by the appellee for the year 1888, \$171.60, had been refunded to him by the city prior to the commencement of ~~this~~ action.

Upon the first proposition counsel assert (1) that section 3157, *supra*, being a part of the general statute for the incorporation and government of cities of the largest class prior to the passage of the charter act approved March 6, 1891 (Acts 1891, p. 137), for the government of cities containing more than 100,000 people, was by the last named act repealed so far as the city of Indianapolis is concerned; (2) that section 3261, *supra*, was expressly repealed by the act approved March 9, 1891 (Acts 1891, p. 398).

The present action was begun August 21, 1894. The repealing clause of the act of March 6, 1891, §134, is as follows: "All laws within the purview of this act, and inconsistent herewith, are hereby repealed." Repeals by im-

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plication are not favored. It is only where the provisions of different acts are so clearly inconsistent that they can not stand together that a repeal will be adjudged. We find no inconsistencies between the charter act referred to and section 3157, *supra*, giving the common council power to refund taxes erroneously collected.

In the case of *Leonard v. City of Indianapolis*, 9 Ind. App. 262, the appellant sought to recover taxes alleged to have been erroneously assessed against certain agricultural lands within the corporate limits of the city of Indianapolis. The court held that section 3157, *supra*, was not repealed by the act of February 21, 1885, §3747 Burns 1894, so as to affect the remedy given by the former section. The court say, at p. 269: "Nor can it be true that either the act known as the City Charter of Indianapolis (Acts 1891, p. 137), or the general law of taxation passed in the same year (Acts 1891, p. 199), can in any manner impair the appellant's right or her remedy.

"Conceding, without deciding, that by the legislation of 1891 both the right and the remedy provided for in such cases as the present one have been abrogated, it still remains true that both the right and the remedy of the appellant had then accrued, and could not be affected by such legislation without an express provision to that effect in the repealing act.

"Section 243 R. S. 1881, provides that 'No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof, but all such rights may be asserted, and such suits prosecuted, as if such laws had not been repealed.'

"And, in §248, R. S. 1881, it is declared that the repeal of a statute shall not work a release or extinguishment of any liability incurred under the same, unless it be so declared in the repealing act." See, also, the recent case of *City of Indianapolis v. Ritzinger*, 24 Ind. App. 65, which expressly holds the said section not in force as to any right or remedy which had accrued to the appellee before the pas-

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sage of the act, notwithstanding its repeal as claimed. The act of 1891, repealing section 3261, *supra*, contains the following proviso: "Provided that nothing contained in this act shall affect pending litigation, and the rights of such litigants shall remain the same as if this act had not been passed"; and counsel for appellant ably argue that the statute thus saving only the rights of those whose suits were pending excludes all others, and that a general saving statute, like §248 R. S. 1881, *supra*, does not apply where there is a special saving clause in the repealing act; citing *State v. Showers*, 34 Kan. 269, 8 Pac. 474. But in view of the expressions of this court cited, we do not deem it profitable to discuss the case named.

As to the second proposition, it is sufficient to say that the section of the statute being in force as to the right of appellee at the time of the payments in question, whether the payments were voluntary or involuntary is not material.

In considering the third proposition, to wit, that the land was not exempt because it was used for other than agricultural purposes and was improved with valuable improvements, we deem it proper to set out the following facts, as disclosed by the record: The tract of land in question originally consisted of fourteen acres, lying between Home avenue, Central avenue, Alabama street, and Morris street. Out of this tract of land two lots on Central avenue, on each of which a house was erected, were conveyed to sons of appellee. Two small houses in addition were built on the fourteen acre tract, one on Alabama street and the other on Central avenue. There remain of the tract practically thirteen acres of ground separately inclosed, near the center of which was situate the dwelling-house of appellee and a stable. Two driveways ten or twelve feet wide, one from the house directly to Central avenue, the other from the house to Alabama street, and a lawn 200 feet wide, extended from the house east to Central avenue, through which one driveway passed. The thirteen acre tract was in one body. The

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only houses upon it were the dwelling-house of the appellee and the stable. The land not occupied by the dwelling-house, stable and driveways was used for meadow and pasture, and the hay was harvested for appellee's stock, and part was occupied by grape vines and an orchard.

Section 3261 R. S. 1881, is as follows: "Lands lying within the limits of any city or incorporated town in this State, * * * and are not used for other than agricultural purposes or are wholly unimproved, * * * shall not be taxed in such city or town, for all purposes, at a higher aggregate percentage upon the appraised value thereof than the aggregate percentage of the tax levy in the civil township wherein such property is situated: *Provided, however,* That the provisions of this act shall not apply to parcels of land containing less than five acres."

The record thus clearly shows that more than five acres of the land in question were used for no other than agricultural purposes. It also shows that it was, not with mathematical exactness, but practically, thirteen acres in quantity. This also disposes of the fourth proposition.

As the fifth reason for the reversal of the judgment, it is claimed that appellee in any event could recover only the actual difference between the general city rate and the township rate.

Section 3261, *supra*, fixes the rule for finding the difference in rates. In construing this section, the Supreme Court, in *Leeper v. City of South Bend*, 106 Ind. 375, say: "Such lands are also subject to all special taxes and assessments which affect them, the same as other property within the city. But they 'shall not be taxed in such city or town, for all purposes,' that is, all general city purposes, at a higher aggregate percentage than the aggregate percentage in the civil township in which they are situate. The evident meaning of this provision is, that such lands shall not be taxed by such city for general city purposes." It is also there held that they are also subject to

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taxation for school purposes within the city the same as other property, citing *City of South Bend v. University of Notre Dame*, 69 Ind. 344. The court distinguished the civil township rates from all other rates where it defines civil township purposes "as purposes such as the property has not already been subjected to taxation for * * *. This leaves it subject to the general burden of State and county tax, also to the city school tax."

In *Leeper v. City of South Bend*, *supra*, the total rate in the city was \$1.25 on the \$100; in Portage township, in which the city of South Bend is situate, for State and county fifty-eight cents; for schools fourteen cents; for general civil township purposes sixty-one cents. The court held that sixty-one cents was the standard, and the difference between sixty-one cents and \$1.25, or sixty-four cents, the amount due and recoverable. In fixing the standard rate in the township, school rates were excluded. School rates in the city were authorized and levied. If excluded in one tax district, they should be excluded in making a comparison of rates in the other; otherwise it would in effect amount to the refunding of the entire school tax levied in the city which has been held a proper tax on farm lands. The inference, therefore, is that the \$1.25 named in the *Leeper* case is the city corporation rate for all purposes, which is, under this construction, limited to general city purposes not including schools.

In *Dickerson v. Franklin*, 112 Ind. 181, the same section is construed. In the course of the opinion, the court say: "This section was construed by this court in the case of *Leeper v. City of South Bend*, 106 Ind. 375. It was then, in legal effect, held that the declaration that the class of lands described 'shall not be taxed in such city or town, for all purposes, at a higher aggregate percentage' than in said section stated, means that such lands shall not be taxed *by* the city or town for general city or town purposes at a higher aggregate percentage than the aggregate percentage of the

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tax levied in the civil township for general township purposes; but that lands of that class are subject to all special assessments by the city or town which affect them in common with the other property of the city or town. We adhere to the construction then given, regarding it still as more in accordance with reason and justice, and with the probable intention of the legislature in enacting the section, than a more strictly liberal construction would be."

The record shows that the standard laid down in the case of *Leeper v. City of South Bend*, 106 Ind. 375, and followed in later cases was observed by the trial court in the case at bar.

The court properly held that appellee's land was not subject to taxation within the city of Indianapolis beyond the sum of the township fund, road fund, and bridge fund tax levies for the year 1888, which, in Center township, in which Indianapolis is situate, amounted to thirty-four cents on each \$100, and the total rate in the city of Indianapolis, which was ninety cents on each \$100 makes a difference of fifty-six cents on each \$100 erroneously assessed.

In support of his assignment of cross-errors, appellee urges that the court erred in deciding that he was not entitled to recover the taxes claimed for 1890. The right to recover the taxes in suit was purely statutory. The section of the statute exempting appellee's property, being section 3261, *supra*, was expressly repealed prior to the payment by appellee of the taxes for that year. Section 3157, *supra*, provides for the refunding of taxes "erroneously assessed against and collected from any taxpayer." The statute provides for the refunding only of the taxes assessed and collected.

The motions for a new trial were properly overruled. We find no error. Judgment affirmed.

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THE LAKE ERIE AND WESTERN RAILROAD COMPANY v.
KEISER ET AL.

[No. 8,178. Filed October 30, 1900.]

RAILROADS.—Fires.—Damages.—Contributory Negligence.—Answers to interrogatories in an action against a railroad company for damages for property destroyed by fire escaping from defendant's right of way, to the effect that the fire was communicated to a pile of sawdust in the vicinity of plaintiff's buildings, and that plaintiff and his employes attempted to extinguish the fire, and, believing that it was extinguished, left the premises, and did not return to examine the same, but that the fire was not wholly extinguished, and continued to smoulder in the sawdust, and began to smoke and was thereafter seen by defendant's section men, who took measures to prevent it spreading, and, in five days thereafter, under an ordinary wind, spread to plaintiff's premises and destroyed his buildings, are not in irreconcilable conflict with a general verdict for plaintiff. *pp.* 419-426.

INSTRUCTIONS.—Refusal to Give.—There was no error in refusing instructions, where the court fully and correctly instructed the jury upon the same subject-matter. *p.* 426.

From the Randolph Circuit Court. *Affirmed.*

J. B. Cockrum, W. E. Hackedorn, George Shirts and W. R. Fertig, for appellant.

James Bingham and Jesse Long, for appellees.

WILEY, J.—Appellees sued appellant to recover for property destroyed by fire, which fire is alleged to have been ignited by one of appellant's passing locomotives on its right of way, and which, it is averred, appellant carelessly and negligently permitted to escape from its right of way onto adjoining premises and thence to appellees property, etc.

The complaint is in three paragraphs. The first paragraph avers that appellant's said road runs near and adjacent to appellees' premises, upon which was a "mill or factory building containing certain machinery," etc.; that ap-

pellant had permitted dry grass and other combustible matter to accumulate on its right of way adjoining appellees' premises; that said combustible matter covered the entire surface of said right of way, and was in that condition on October 2, 1897, and had been for some time prior thereto; that said combustible matter extended on the right of way to and connected with appellees' premises; that on said day, in running a locomotive engine over its track, appellant carelessly and negligently omitted to use spark-arresters or proper appliances to prevent the emission of sparks; that appellant in so running said locomotive, negligently and carelessly permitted it to emit sparks and fire into said grass and dry weeds, etc., whereby the same was ignited, and negligently permitted the fire so ignited to escape from its right of way and spread to and ignite appellees' buildings, etc., and destroy the same, without any fault, carelessness, or negligence on the part of appellees.

The second paragraph is substantially like the first, except it does not charge that appellant's locomotive was not properly equipped with a spark-arrester and other appliances to prevent it from emitting sparks and coals of fire. The third paragraph is so like the first and second that it is unnecessary to mention it further.

Appellant demurred to each paragraph of the complaint, which demurrer was overruled. The case was put at issue by answer in denial; trial by jury, resulting in a general verdict for appellees. With the general verdict the jury found specially as to certain facts by answering interrogatories propounded to them. Appellant moved for a new trial and for judgment on the answers to interrogatories notwithstanding the general verdict. All these adverse rulings appellant has assigned as errors.

Appellant's counsel have not discussed the assignment of error challenging the action of the court in overruling the demurrer to each paragraph of the complaint, and hence the question is waived.

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The other two questions will be considered in their order. (1) Did the court err in overruling the appellant's motion for judgment on the answers to the interrogatories? It was not error so to overrule the motion unless the answers or some of them are in irreconcilable conflict with the general verdict, for by the general verdict the jury determined every material fact essential to appellees' recovery in their favor. To determine this question, we must look to the facts established by the answers to interrogatories.

The jury found that the property destroyed was at the time of its destruction owned by appellees; that appellant owned and operated the said railroad as alleged in the complaint; that all the appellees, except Clarence B., Grace, and Priscilla D. Keiser were non-residents at the time of the fire; that at the time of and prior to the fire, Clarence B. Keiser was part owner of the property destroyed, and had supervision thereof; that the fire which communicated to appellees' buildings originated on appellant's right of way September 26, 1897; that said fire communicated with weeds and grass on appellees' premises adjoining said right of way, and from thence on the same day communicated to a pile of sawdust lying immediately in the vicinity of appellees' buildings; that on the 27th of September, 1897, appellee Clarence B. Keiser was notified that said fire had been set and communicated to said pile of sawdust, and that the same was in dangerous proximity to said buildings; that prior to the time the said Clarence B. Keiser received such notice two persons in his employ were notified thereof, and hastened to said fire to extinguish it; that while they were so engaged, the said Clarence B. went to said premises and observed the fire and the efforts to extinguish it; that the said Clarence B. left said premises at that time before his two employes did; that when said employes left said premises at about 6 o'clock p. m. of said day, they believed that the fire in said pile of sawdust had been extinguished; that while there they poured water on it, and with shovels

dug up the sawdust around or partially around said premises; that said fire in said sawdust was not in fact extinguished on September 27th; that said fire continued to smoulder in the sawdust from September 27th to October 2, 1897; that between September 27th and October 2nd, none of the appellees visited said premises; that during all of said time, the said Clarence B., Grace, and Priscilla Keiser resided in the city of Muncie; that on the morning of the 28th of September, the section men in the employ of appellant dug a ditch around said pile of sawdust about three or four feet wide at the top and about two feet deep, for the purpose of preventing the spread of the fire from the sawdust to the buildings; that said sawdust was northeast of the buildings, and on the day of the fire the wind was from the northeast; that the buildings, etc., described in the complaint, were destroyed by fire October 2, 1897; that the fire which consumed the buildings was communicated from the pile of sawdust; that there was no fire on the right of way between September 26th and October 2nd; that, under all the facts proved, the appellees exercised the care to protect their property from the danger of fire that an ordinarily prudent man would have exercised; that from September 28th to October 2nd smoke was visible coming from the immediate vicinity of said sawdust pile; that none of the appellees made any effort after September 27th to discover whether said fire in the pile of sawdust had actually been extinguished; that if appellees, or either of them, had visited said premises on September 28th, 29th, and 30th, and October 1st, they could have discovered by the use of ordinary diligence that fire was still present in the pile of sawdust adjacent to their buildings.

Upon these answers, counsel for appellant urge that it was entitled to judgment notwithstanding the general verdict, because they show that appellees were guilty of negligence. They assume this position under the rule that where the owner of property has notice of danger by fire, it is negli-

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gence on his part if he fails to use all means within his power to extinguish it.

In the case of *Wabash, etc., R. Co. v. Miller*, 18 Ind. App. 549, this court, by Black, J., said: "When, in such a case, the property owner had notice of the fire endangering his property to the loss for which he sues, if he could have prevented the loss by reasonable effort, and did not make such effort, or unless any attempt he could make and did not make to save his property after he discovered its danger, would be useless or extraordinarily hazardous or difficult, he can not recover for such loss. If he fail to do his duty, then to the extent to which his loss is attributable to such failure, he must bear it without compensation from the company. Where, as in this State, the burden rests upon the plaintiff to show his want of contributory negligence, it becomes necessary for him to show whether or not he or his servant in charge of the property had knowledge of the existence of the fire during its progress, and if it is not made to appear that such knowledge did not exist, then it devolves upon the plaintiff to show what efforts were made to save him from loss, and it is incumbent upon him to prove the use of efforts reasonable under the circumstances." In support of the rule just quoted, many authorities were collected and cited, to which we refer without comment.

The rule to which we have just referred is well entrenched by the authorities in this and other states, and would be controlling here if it were applicable to the facts upon which the decision rests. It is made perfectly plain by the facts specially found, and also by the evidence, that as soon as the appellees learned of the danger to their property, Clarence B. Keiser, who had charge of it for himself and co-appellees, repaired to the scene of the danger with two other persons in his employ for the purpose of extinguishing the fire. This they proceeded to do by the best means at their command. They carried water and poured onto the fire; took shovels and shoveled and stirred up the sawdust

where the fire was burning, and continued such process until they thought and believed that it was wholly extinguished. This property was not occupied or in use, and Clarence B. lived two miles from it. After the effort made to extinguish the fire, and the belief that it had been extinguished, he had a right to rest in that belief, in the absence of any information to the contrary.

The law requires of a person who sees or knows his property is in danger of destruction by fire caused by the negligent act of another, to use every reasonable effort and diligence to save it from impending danger, and if in this case the facts specially found show that appellees did this, and exercised such care as an ordinarily prudent person would have exercised, etc., they can not be charged with contributory negligence. By the general verdict, the jury resolved every material fact in favor of the appellees, and we are unable to find any inconsistency or contradiction of the general verdict in the facts specially found.

The facts of this case bring it squarely within the rule stated in the case of *Tien v. Louisville, etc., R. Co.*, 15 Ind. App. 304, in which it is said: "If a fire be negligently started, and negligently permitted to escape upon the premises of another, the owner of such premises, if he have knowledge thereof, must exercise due care to prevent the injury, or he will be deemed guilty of contributory negligence. But the landowner is not required to live upon his premises, and keep a vigilant outlook for possible negligence upon the part of others, nor is he required to hire guards for such purposes. He is not bound to anticipate that another will be derelict in his duty toward him. He may rely upon the presumption that such person will conform to the legal duties resting upon him", citing several authorities. So in this case, after appellees had been informed of the danger to which their property was exposed by the negligence of appellant, and had exercised ordinary care and prudence to subdue and extinguish the fire, they

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were not required to go and live upon the premises or to place a guard there to protect their property from appellant's negligence. It is shown by the facts specially found that the property was adjacent to appellant's railroad, and it appears that appellant's servants passed over and upon the track daily from the time appellees made the effort to extinguish the fire up to the time the property was actually destroyed, and that smoke was seen coming from the smouldering fire in the sawdust daily between such dates, and they made no effort to extinguish the fire, except to dig the ditch mentioned, nor did they inform appellees. Thus it is manifest that appellant's servants knew that the fire was not extinguished, and in such case the law imposed upon them the duty of protecting the appellees' property from its possible consequence.

In 3 Elliott on Railroads, §1232, it is said: "Where it is possible for a company to easily extinguish a fire negligently started it would be to the best interests of the company to do so, for it could thus lessen the amount of damages for which it would be liable. Most of the authorities, however, in defining the duty of a company to extinguish a fire do not make any distinction between fires negligently started and those not negligently started. Some of the authorities hold that where there was no negligence in starting a fire no duty rests upon the employees of the company as servants of the company to extinguish the fire, and that the company is not liable for a failure to extinguish such a fire. But the weight of authority seems rather opposed to the doctrine just stated and it is held that where a fire has been set by sparks from locomotives of the company and the company's servants discover the fire in time to extinguish it and prevent it from doing damage to others and negligently fail to do so, the company will be liable. Where a fire is discovered by the employees operating a train the duty of such employees to the passengers would seem to be superior to their duty to stop and extinguish the fire and thus delay

the train, but where a fire is discovered by trackmen walking or traveling along the track, they should use care to extinguish it." See authorities cited.

The fact that the fire was started one day and was apparently extinguished, and after, without any intervening cause, it springs into new life and spreads, does not relieve the company from liability, where it, through its servants, has knowledge of such facts; and in such case they are bound to use every reasonable precaution to prevent injury, as in the first instance.

Counsel for appellant urge that the fire which destroyed appellees' property was due to an independent cause, to wit, the wind. The facts disclosed by the record do not support this proposition.

In the case of *Haverly v. State Line, etc., R. Co.*, 135 Pa. St. 50, 19 Atl. 1013, the plaintiff had notice of the fire, and, as in this case, made an attempt to extinguish it, and believed he had done so, but in fact had not, and the fire subsequently broke out anew and spread to his property and destroyed it. The court in deciding the case said: "The break in the chain of events was merely a gap in the time. Had the fire extended from the stump to plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with *Pennsylvania R. Co. v. Hope* [80 Pa. 373]. But the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the causal connection was broken. The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury have found that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection. In *Pennsylvania R. Co. v. Kerr*, [62 Pa. St.

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353] it is said by Thompson, C. J., that the rule 'is not to be controlled by time or distance, but by the succession of events;' and in *Hoag v. Lake Shore, etc., R. Co.*, [85 Pa. St. 293] Trunkey, P. J., in charging the jury, had quoted the foregoing, and added: 'Whether the fire communicated to the plaintiff's property within a few minutes, or after the lapse of hours from the negligent act, may be immaterial.' It is said in this case that the agents of plaintiff on the ground did not anticipate a further spread of the fire after the interval of time, and therefore it can not be assumed that the defendant should have anticipated it. But the agents of plaintiff did not expect it, because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning; and this was the danger that appellant was bound to contemplate, to wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently. The pauses in the progress of the fire, therefore, and the lapse of time, while matter for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection." It was also held in that case that it was the duty of the railroad company to anticipate the results of ordinary winds under such circumstances. The evidence in this case shows that on the day of the fire there was only an ordinary wind blowing. See, also, *Chicago, etc., R. Co. v. Kreig*, 22 Ind. App. 393; *Chicago, etc., R. Co. v. Luddington*, 10 Ind. App. 637; *Chicago, etc., R. Co. v. Williams*, 131 Ind. 30; *Louisville, etc., R. Co. v. Nitsche*, 126 Ind. 229, 9 L. R. A. 750.

If appellees had not known of the fire, they would have had no duty in regard to it; but knowing it, they were bound to take all reasonable and practicable measures to prevent its spreading to their property. They were not insurers. The measure of their duty in this regard was reasonable care and diligence, and whether they used these

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was for the jury to determine from all the facts. Both by the general verdict and the answers to interrogatories, the jury resolved this fact in their favor. There is no contradiction between the general verdict and the answers to interrogatories. Appellant's motion for judgment on the answer to interrogatories was properly overruled.

The only question presented under the motion for a new trial is the alleged error of the court in refusing to give instructions numbered one to five, inclusive, tendered by appellant. All these instructions related substantially to the same subject-matter, and that was that if the appellees had notice of the fire and undertook to extinguish it and left such work unfinished, they could not recover unless they showed that further effort on their part would have been unavailing. There was no error in refusing these instructions for two reasons: (1) They did not state the law correctly as applied to the facts, and (2) the court fully instructed the jury upon the same subject-matter, and correctly stated the law as applied to the facts.

Judgment affirmed.

HOLLIS ET AL. v. ROBERTS.

[No. 3,081. Filed October 31, 1900.]

PLEADING.—*Answer*.—*Demurrer*.—A demurrer to an answer in bar because "it does not state facts sufficient to constitute a cause of action" presents no question. *p. 427.*

APPEAL AND ERROR.—*Record*.—Where the record fails to show that the trial court made any ruling upon a demurrer to a pleading, no question is presented. *p. 427.*

SAME.—*Record*.—*Precipe*.—Where the record purports to contain such parts of the proceedings as were ordered by the precipe, only such entries and papers as are embraced in the precipe are properly parts of the record, and, in the absence of the precipe, the record in such case cannot be considered. *p. 427.*

From the Madison Circuit Court. *Affirmed.*

G. A. Dentler, for appellants.

J. M. Hundley, W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellee.

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ROBINSON, C. J.—A demurrer to an answer in bar because “it does not state facts sufficient to constitute a cause of action” presents no question.

Where the record fails to show that the trial court made any ruling upon a demurrer to a pleading, no question is presented.

Appellants’ complaint avers that William Hollis died the owner of certain lands, leaving Matilda Hollis, who was a childless second wife, and appellants as his heirs; that the lands were partitioned and a portion set off to Matilda Hollis for life, which portion she conveyed to appellee; appellee then leased the lands for one year from March 1, 1895, to March 1, 1896, to Calvin Jones, for \$200, for which Jones gave his note payable September 1, 1895; that appellee indorsed the note for collateral security to a bank, and on August 31, 1895, Jones paid the note to the bank; that appellants did not come into possession of the land during the term of the lease; that Matilda Hollis died June 12, 1895; that the portion of the rent that accrued after June 12, 1895, is due appellants and unpaid.

The motion for a new trial, on the ground that the court’s finding is contrary to the evidence and the law, was properly overruled. The only evidence in the case was that introduced by appellants, and it fails to sustain the complaint. Upon the evidence the judgment of the court was right.

The judgment must be affirmed for another reason. The clerk certifies “the above and foregoing to be a true, full, and complete copy of the papers, rulings and entries in the above entitled cause as ordered by the precipe filed by the attorneys in the above entitled cause, which papers, rulings, and entries are now on file at this office”. But the precipe is not appended to the transcript as the statute requires. §661 Burns 1894. Only such entries and papers as are embraced in the precipe are properly parts of the record. In the absence of the precipe it can not be known what entries and papers are properly in the record. *Allen v. Gavin*,

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130 Ind. 190; *McCaslin v. Advance Mfg. Co.*, 155 Ind. 298; *Brown v. Armfield*, 155 Ind. 150; *Reid v. Houston*, 49 Ind. 181. Judgment affirmed.

THE CITY OF INDIANAPOLIS v. MAROLD.

[No. 8,108. Filed November 1, 1900.]

MUNICIPAL CORPORATIONS.—Repair of Street by Independent Contractor.—Negligence of City.—A street was being improved by independent contractors. It became necessary to lower a bridge forming part of the street so as to correspond with the new grade. One end of the bridge was raised several inches in order that the abutment might be cut down. While the bridge was thus raised the workmen employed by the contractors placed a block at the end of the bridge, making a step for footmen who continued to cross. During the time the bridge and street were being repaired the plaintiff passed over the bridge several times, using the block as a step in descending therefrom. At dusk on a certain evening, about two hours after plaintiff had thus crossed the bridge in safety, he attempted again to cross. No lights or barriers having been placed at the bridge, the plaintiff fell and was injured. *Held*, that the city was liable. pp. 428-436.

DAMAGES.—Excessive Damages.—Appeal.—The verdict of a jury will not be set aside on appeal on the ground that the damages assessed are excessive, where the damages assessed are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, partiality or corruption. pp. 436, 437.

EVIDENCE.—Standard Life Tables.—Personal Injuries—In an action against a city for personal injuries sustained by reason of the city's negligence, standard life tables may be introduced in evidence to show the probable duration of the plaintiff's life on the question of compensation, where the injuries are shown to be permanent. p. 437.

From the Marion Superior Court. *Affirmed*.

J. W. Kern and *J. E. Bell*, for appellant.

J. W. Noel and *F. J. Lahr*, for appellee.

COMSTOCK, J.—Appellee brought this action to recover for personal injuries received by him by falling off a bridge in the city of Indianapolis on the evening of the 15th day of October, 1896. The bridge crosses the canal at Vermont street in said city, and was at the time resting upon jacks

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and scaffolds for the purpose of constructing a new wall beneath the same, so that it could be lowered to correspond with a new pavement then being constructed upon Vermont street. The cause was tried by a jury, and a verdict returned in favor of appellee for \$5,000. Answers to interrogatories were returned with the general verdict. The plaintiff remitted \$2,000, and judgment was rendered in his favor for \$3,000.

Counsel for appellant discuss only the action of the trial court in overruling its motion for a new trial.

The record discloses substantially the following facts: The canal running through the city of Indianapolis is located in a part of Missouri street, which street runs north and south. Vermont street runs east and west and intersects Missouri street and the canal. The bridge crosses the canal extending the full width of Vermont street, and consisted of six passageways, the one at the extreme north and the one at the extreme south being footways, and the other four passageways driveways for vehicles, differing only from the footways in that the driveways were the wider. These six passageways were each separated from the other by iron balustrades. The footways at one time corresponded to the sidewalk on each side, but at the time of the accident the passageways left open for pedestrians corresponded to the first driveway on the north side of the bridge lying adjacent to the north footway. The Big Four Railroad track ran north and south along the east side of Missouri street, and adjacent to the east end of said bridge, the nearest rail being about six or seven feet east of the east end of the bridge.

Prior to the time of the accident the city of Indianapolis had contracted with independent contractors for a block pavement on the roadway of Vermont street. It became necessary that the bridge across the canal should be lowered nine inches, to make it conform to the grade of the new block pavement. The city of Indianapolis entered into a

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written contract with independent contractors to lower the bridge so as to make it conform to said grade. The bridge rested on stone abutments, and in order to lower the bridge it was necessary to raise each end and cut down the stone wall supporting it. The independent contractors began two or three weeks prior to the accident, by raising the west end by means of jacks so that the weight was off the wall. The wall was then taken down to the proper height and the bridge let down upon the wall. After the west wall had been lowered and the bridge lowered upon said wall the workmen proceeded to the east end of the bridge and raised it by means of jacks so as to relieve the wall; the wall was then cut down to the proper height, and the east end of the bridge lowered upon it, so that it conformed to the grade of the block pavement.

During all of this time the street was closed to vehicles by reason of the torn up condition of the block pavement, and neither the bridge nor the street adjacent it was used by vehicles, but during none of such time was the street closed to pedestrians. At the east end of the north drive a block four or five feet long and about twelve inches square was placed by workmen of the contractors so that it formed a convenient step from the bridge to the block, then from the block to the adjacent ground. This block was placed there on purpose, to enable the people to pass easily over the bridge, and remained there for several days for that purpose and until after 4 o'clock of the afternoon preceding the accident, which occurred at about ten minutes to 6 o'clock. No planks, footways, or bridges were laid at any time from the east end of said bridge to the ground until the next morning after the accident.

Vermont street was a much traveled street, and travel continued apparently uninterrupted over said bridge during all the time it was under repair. A great many people passed over it by day and by night, to the plaintiff's knowledge. Appellee lived on the west side of Missouri street,

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about half a square south of the bridge. The east end of the bridge was first raised on Monday, and the injury occurred on the following Thursday. The appellee passed over the bridge many times during this time, several of the times being after night. He passed over the bridge at the north drive, and descended over the east end thereof by means of this block provided as a step. That at about 4 o'clock on the day of the injury, he passed over the bridge by the north drive, following said passageway, and in a few minutes returned, following the same course, passing over both times without inconvenience and with safety. That about ten minutes before 6 o'clock in the evening of the same day, it being the 15th of October, and darkness approaching early, he started again to cross the bridge. It was getting fairly dark. Twilight was just passing away. It was cloudy. The moon was obscured by clouds. The planks of the bridge floor and the balustrades could be discerned. Appellee testified that he could not see the railroad tracks six or seven feet away "right plain." As he approached the bridge from the west to the east, he followed the same course he had traversed nearly two hours before and at other times during the week and where he had often crossed over in safety. As he came to the east end of the bridge he approached the edge slowly and cautiously and looked for the block upon which he had crossed the bridge. As he looked he was sure it was there and stepped towards it, but the block had, without his knowledge, been removed, stones had been piled in the path which two hours before had been open to pedestrians, and he fell and sustained severe injury. In crossing the bridge he proceeded slowly, exercising his senses to follow the safe path.

Appellant asks that the judgment of the court be reversed (1) because "appellee had complete knowledge of the condition of the bridge, and in going upon it as he did assumed all the risk." It is true that appellee was familiar with the general condition of the street and the bridge prior to

and at the time he received his injury. He did not know, as found by the jury in answer to interrogatories, that the block or step had been removed after he had seen and used it at 4 o'clock of the day of his injury. The fact which made the use of the bridge dangerous to him, with his knowledge of the premises, was the removal of the block, of which he had no knowledge, and which he had no reason to expect. Looking for and believing that he saw the block in place, he could not be said to have voluntarily encountered a known danger. He did not, as found by the jury, know the true condition of the premises. The principle, therefore, for which counsel contend does not apply. (2) "It was light so that appellee by the use of ordinary care could have seen the absence of the block on which he tried to step." The jury have specially found that appellee crossed the bridge slowly and cautiously and was carefully looking at the place of the danger known to him; and before taking the step which led to his injury, he looked carefully. The degree of light was uncertain; the evening was cloudy; some objects he could discern distinctly, others not; lights had been lighted in the neighboring houses. Manifestly the night was not sufficiently light to enable him to see that the block onto which he intended to step was not where he believed it to be. (3) "Reasonably safe footwalks had been placed at each end of the footways of said bridge over which he could have passed without danger." Upon this question the evidence is not in entire harmony, but the jury found against the claim of appellant. The question was for their decision. (5) "The block or step where appellee fell was not placed there by the city." The city did not have notice that the block had been removed at the time of the injury. The work was being done by an independent contractor. The evidence is conclusive that the block was placed in position to be used as a step by workmen employed by the contractor. The nature of the work, the lowering of a bridge, and the paving of a much traveled street necessarily

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raised obstructions to travel, and made dangerous defects that the appellant was bound to take notice of and to guard. The paving of the street made the lowering of the bridge necessary. The rule is settled that a city when performing a duty imposed upon it by law can not shift the responsibility for conditions created by itself in the performance of such duty upon a contractor, and rid itself of its obligations.

Judge Dillon, in his work on Municipal Corporations, section 1027, says: "Whether the duty of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation, or is deduced in the manner before stated, *it rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a traveled street or sidewalk, *by a contractor under the corporation* for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect."

And upon the same subject at section 1030 he says: "Accordingly, the later and better considered cases in this country respecting streets have firmly, and, in our judgment, reasonably, established the doctrine that, where *the work contracted for necessarily constitutes an obstruction or defect* in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly

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from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract-work, and entirely the result of the negligence or wrongful acts of the contractor, sub-contractor, or his servants. In such a case the immediate author of the injury is alone liable."

The work contracted for created defects that were necessarily dangerous to travel, especially by night. The improvement contemplated the creation of dangerous places and charged the appellant with notice of the necessity for guards and signal lights.

In *Park v. Board, etc.*, 3 Ind. App. 536, the court say: "It is clear, from the authorities cited, that the obligation of a town or city to keep its streets in a safe condition for the passage of persons and property is a primary one, and the municipality cannot divest itself of this duty. It is also well settled by the greater weight of authority, that because of this duty to the public, a city or town, when having work done upon its streets or bridges, although by a contractor, is bound to see that such precautions are used while the work is in progress as are reasonably necessary to protect travel. No matter what kind of contract the city may make, nor with whom, it still remains charged with the care and control of the street in which the improvement, change or repair is being made, and it can not throw off its duty and the responsibilities through which that duty is to be enforced. 2 Dillon Munic. Corp., section 1027; *Storrs v. City of Utica*, 17 N. Y. 104; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Circleville v. Neuding*, 41 Ohio St. 465; *City of St. Paul v. Seitz*, 3 Minn. 297; *Brooks v. Inhabitants, etc.*, 106 Mass. 271; *Groves v. City of Rochester*, 39 Hun 5; *Wilson v. City of Wheeling*, 19 W. Va. 323; *City of Jacksonville v. Drew*, 19 Fla. 106; *Dressell v. City of Kingston*, 32 Hun 533; *Welch v. City of St. Louis*, 73 Mo. 71;

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Hawthurst v. Mayor, etc., 43 Hun 588; *Russell v. Inhabitants, etc.*, 74 Mo. 480. And in such cases notice to the municipality of the absence of proper precautions or guards would not be necessary. *Brusso v. City of Buffalo, supra*; *Brooks v. Inhabitants, etc., supra*; *Ironton v. Kelley*, 38 Ohio St. 50; *Groves v. City of Rochester, supra*; *Board, etc., v. Pearson*, 120 Ind. 426."

At the time appellee received his injury, there were no lights nor barricades giving notice of the danger. If the appellant had performed its duty in seeing that the place was properly lighted or guarded, it would have known of the absence of the block or step on which appellee relied. It is evident, and the jury find, that the presence of a light would have enabled appellee to have avoided the accident which resulted in his injury.

(6) "All travel for vehicles had been shut off from said bridge, and no invitation of any kind was held out to the public to pass over said bridge where the driveways were located, and where appellee fell." Neither the street nor the bridge was barricaded. While the torn up condition of the bridge precluded travel by vehicles, the jury found that "the place over which he crossed at the time of his injury had been held out to the plaintiff's knowledge as a proper place for travelers to cross said bridge." This finding is amply supported by the evidence.

(7) "The work upon the bridge was being done by independent contract, and the city had no control over the manner in which the work was done." What we have said upon the fourth proposition of appellant is applicable to the seventh.

(8) "Appellee was guilty of negligence in going where he did at the time he received his injury." We need cite no authorities in support of the proposition that a person is not necessarily precluded from recovering for injuries resulting from defective streets because he had knowledge of such defects. Under such circumstances one is required to

use care commensurate with the known danger. The negligence of the injured party is a fact to be determined by the jury. The answers to interrogatories show that appellee exercised more than the care of an ordinarily prudent person. His injury was the result of want of care upon the part of the city.

The trial court refused to give to the jury instruction numbered two requested by the appellant. This instruction was upon the theory that there were footways for passengers at the north and south sides of the bridge, and from the ends of these footways, which corresponded with the sidewalks, footwalks had been constructed of long planks leading from the bridge to the ground, and that appellee, being familiar with the situation, should have walked over them on the afternoon of his injury; that not having done so, but having attempted to step down from the east end of the bridge at a point other than where such footways were located, and being injured thereby, he could not recover. This action of the court is made a reason for a new trial. This instruction is substantially covered by instruction numbered thirteen, given by the court. Appellant was not therefore harmed by this ruling of the court.

Appellant excepted to the giving to the jury of the seventh, ninth, and fourteenth instructions. The instructions given, considered together, define negligence, the liability therefor, and contributory negligence, and applies the law to the theory of the case maintained by appellant and appellee. They thus fairly perform the office of instructions.

It is claimed that the damages assessed are excessive. Two thousand dollars of the amount of the verdict was deemed by the court excessive. The amount for which the judgment was rendered stands for the opinion of the trial court after a careful review of all the evidence. The damages assessed are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, par-

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tiality, or corruption. Under numerous decisions of the Supreme Court and this court, we would not be sustained in disturbing it. See, *Lauter v. Duckworth*, 19 Ind. App. 535 and cases cited.

In conclusion, counsel for appellant state that it was error "to admit in evidence the mortuary tables and the testimony of the witness Cougill read from his deposition as to the value of appellee's earning capacity during his expectancy." It is further stated that evidence of this class is only admissible where there is a permanent injury followed by total disability. No reference is given to where the evidence may be found, and no authorities are cited in support of this claim.

We deem it, therefore, only necessary to say that "standard life tables may be introduced to show the probable duration of the plaintiff's life on the question of compensation for permanent injuries." *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Shover v. Myrick*, 4 Ind. App. 7.

Dr. Rowe, the appellee's attendant physician, testified that appellee was permanently injured.

We find no error for which the judgment should be reversed. Judgment affirmed.

THE STATE v. TRUEBLOOD ET AL.

[No. 3,178. Filed June 20, 1900. Rehearing denied Nov. 1, 1900.]

CRIMINAL LAW.—*Illegal Allowance by County Commissioners. — Indictment.*—Under §7853 Burns 1894, making it a public offense for the board of county commissioners, except in case of indispensable public necessity, to make any allowance to certain named county officers, an indictment for the payment of money to the county auditor for extra work as clerk of the board on account of gravel roads is held to be insufficient.

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley, J. A. Zaring, McHenry Owen and S. B. Lowe, for State.

J. C. Lawler and M. B. Hottel, for appellees.

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COMSTOCK, J.—The indictment in this cause is in two counts. We are informed by counsel for the State that the first count is based upon §7853 Burns 1894, §5766 Horner 1897. The second count is based upon §2105 Burns 1894, §2018 Horner 1897. From the action of the trial court in quashing the indictment, the State appeals.

For convenience, we set out, omitting the formal parts, the first count: "On the 27th day of November, 1897, at the county of Lawrence and State of Indiana, Henry C. Trueblood, Matthew Robertson, and John W. Cosner then and there constituted and were members of the board of county commissioners of said county of Lawrence, in the State of Indiana, duly elected, qualified, and acting, and as such did then and there each unlawfully and wrongfully favor, vote for, and urge, procure, and induce each other to vote for and favor a certain allowance unto John B. Malott, who was then and there the duly elected, qualified, and acting auditor of said Lawrence county, there being then and there no indispensable public necessity for such allowance and no such necessity being found and entered of record by said board of county commissioners as part of its orders in making its orders in making such allowance, and there being no necessity whatever for such allowance, and said allowance not being specifically or otherwise required by law, but being illegal and wholly unwarranted by law, which said allowance was then and there unlawfully made by said board of commissioners in the sum of \$500 for certain pretended services, which services the said John B. Malott then and there claimed to have rendered to the said county of Lawrence in the performance of certain duties, that is to say, extra work on account of gravel roads as clerk of board for thirty-two months at \$25 per month, \$800, which said claim was then and there by said board of county commissioners reduced to the sum of \$500, which said sum of \$500 was then and there by said board of com-

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missioners, each member thereof as aforesaid unlawfully favoring the same, unlawfully and wrongfully allowed on said claim to said John B. Malott, who was then and there auditor of Lawrence county. That the duties performed by said Malott for which said claim was filed, pretended, and allowed were and are duties which said auditor was and is legally required to perform as a part of the duties of said office without extra pay, and said allowance was wholly unnecessary and unlawful. Contrary," etc.

The second count charges the same facts as to the filing and allowance of the same claim, and charges the failure to perform a certain duty in the manner and within the time prescribed by law, as provided by section 2105, *supra*.

This court, in the recent case of *State v. Trueblood*, 23 Ind. App. 31, in which the same question presented by the second count of the indictment before us was involved, held that the acts charged did not constitute any offense under the section named. To that decision we still adhere.

It only remains, therefore, to consider the sufficiency of the first count. Section 7853, *supra*, reads as follows: "The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, sheriff, assessor or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff or any employe of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer, or for any duty to be paid by commission or percentage. For a violation of these provisions, each member of such board favoring the same shall be guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than double nor more than five times the amount of such allowance, to which may be added imprisonment in the county jail for any period not more than sixty days, and the office of such commissioner shall be declared forfeited. If it be found neces-

sary, and so entered of record, to employ any person to render any service as contemplated in this section, as a public necessity, the contract for such employment shall be spread of record in said court; and, for such services rendered, the claimant shall file his account in said court ten days before the beginning of the term, and any taxpayer shall have the right to contest the claim." This section of the statute makes it a public offense for the board of county commissioners, acting as such board, unless in a case of indispensable public necessity, which fact is to be found and entered of record as part of its orders, to make any allowance not specifically required by law to either of certain officers named therein.

The general rule is recognized that material matters in either civil or criminal pleadings must be directly alleged, and not stated by way of recital. *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Shafer v. Bear, etc., Co.*, 4 Cal. 294; *Hall v. Williams*, 13 Minn. 260; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578.

It will be observed from the reading of the indictment that the allegation as to the necessity for the allowance and as to its specific requirements by law are by recital, and not direct averment. The words "illegal" and "unwarranted" are conclusions of law, and do not describe the offense attempted to be charged. This count does not charge that the allowance was made out of the moneys of the county of Lawrence. The date at which the services were claimed to have been rendered is not stated. Its averments are not sufficient to bar another prosecution for the same offense. It does not appear, except by inference, that the party named as auditor, at the time the claim was filed and allowed, was auditor at the time the services were rendered, for which compensation was claimed. This date is material, for under the law in force until March 11, 1895, the board of county commissioners were authorized to employ and pay a clerk to record the proceedings of the board in a book provided for

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such purpose. §7831 Burns 1894, §5746 Horner 1897. It is a principle of criminal pleading that an indictment upon a statute must state the facts which constitute the definition of the offense in the act so as to bring the defendant within it. The indictment before us may be true and the defendant not guilty of the offense described in the statute.

The court did not err in sustaining the motion to quash. Judgment affirmed. Wiley, J., dissents.

DISSENTING OPINION.

WILEY, J.—I concur with my associates in holding that the second count of the indictment is bad, but am not in accord either with the reasoning or the conclusion reached in the prevailing opinion holding that the court correctly sustained the motion to quash as to the first count.

In determining the sufficiency of the first count there are two sections of the statute which may properly be considered, viz., §§7853, 6548 Burns 1894. The former section is quoted in the prevailing opinion, and need not here be repeated. The latter section is as follows: "It shall be unlawful for any board of commissioners to allow any county, township or other public officer, any sum of money out of a county treasury, except when the statutes confer the clear and unequivocal authority to do so." Section 7853, *supra*, prohibits the board of commissioners from making any allowance to any county auditor, etc., which such allowance is not specifically required by law, unless in case of indispensable public necessity to be found and entered of record as a part of its order. This section also provides a penalty for the violation of its provisions. Section 6548, *supra*, makes it unlawful for a board of commissioners to allow any county, township, or other public officer any sum of money out of the county treasury except when the statutes confer the "clear and unequivocal authority to do so." This section makes such allowance of money unlawful, but does not prescribe a penalty.

The first question to be determined is, was the claim of the county auditor, which was filed by him and allowed by the board, and which is described in the first count of the indictment, an unlawful or unwarranted claim? If the auditor was not entitled to the compensation specified in the claim filed, and as allowed, then it was an illegal claim against the county; there was no liability on the part of the county, and its allowance by the board was unlawful, within the meaning of the statute. I am informed by the indictment that the basis of the claim of the auditor was for extra services claimed to have been rendered by him on account of gravel roads, as clerk of the board for thirty-two months, at \$25 per month. By the act of 1891, the compensation of county officers in this State was graded and fixed. It is plain that it was the intention of the legislature by said act to regulate, adjust, and fix such compensation, to the end that constructive fees should neither be charged nor paid. The law, as then passed, became a public necessity to correct well known abuses that had grown up under our former laws, and that the public might be protected against unjust and unwarranted claims of public officers. By the act of 1891, the salary of the auditor of Lawrence county was fixed at \$2,400. Acts 1891, p. 433. By the amended act of 1895, the salary of the auditor of said county was fixed at \$2,300 per annum. §7403 Horner 1897. §7356 Horner 1897, being a part of the amended fee and salary law of 1895, provides that "The county officers named herein shall be entitled to receive for their services the compensation specified in this act * * * * subject to the conditions herein prescribed, *and they shall receive no other compensation whatever.*" The italicization is my own. The act of 1891, *supra*, contained the same provision. Acts 1891, pp. 427, 428. Section 7450 Horner 1897, provides for the taxing of certain fees by county auditors in behalf of their respective counties, the fees and amounts to be designated "Auditor's costs," but it is fur-

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ther provided that such fees so taxed "shall in no sense belong to or be the property of the auditor, but shall belong to and be the property of the county." Among the many duties of a county auditor prescribed by the legislature is that "by virtue of his office he shall be clerk of the board of county commissioners of his county, and shall keep an accurate record of all the corporate proceedings of such board." §5895 Horner 1897. By §5740 Horner 1897, it is made the duty of the auditor to attend the meetings of the board of commissioners and to keep a record of their proceedings. If the legislature has provided any extra or additional compensation for a county auditor for performing the duty prescribed in the section of the statute just cited, I am unable to find it, and counsel have not pointed it out in their brief. I have thus referred to all the statutes that have any bearing upon the question now under consideration, and it seems manifest that in none of them is any provision made authorizing the payment, by a board of commissioners, of a claim against a county of the character of that described in the indictment; while on the contrary there appears to have been a studied effort on the part of the legislature in these several enactments to guard against such claims and the payment thereof. While it is unnecessary to refer by sections to the law, it is sufficient to say that the legislature has clothed the several boards of commissioners in this State with power and jurisdiction, under certain conditions and within fixed limitations, to have constructed under their orders free gravel roads. This authority is conferred upon them in the same manner as their authority to grant liquor licenses, to order, on petition, the construction of public ditches, to lay out, vacate, and change public highways, to build court-houses, etc., is conferred. The board of county commissioners is a statutory body, and all its powers, its authority and its jurisdiction are conferred upon it by the legislature, whose creature it is. When a board of county commissioners is exercising its

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jurisdiction and powers relating to the construction, etc., of gravel roads, as delegated to it by the legislature, it is simply acting as a board of county commissioners, and in no other capacity. When the respective commissioners are sitting as a board, transacting the public business entrusted to them, it is made the duty of the county auditor, as I have shown, to attend their sessions and to keep a record of their proceedings. This duty is enjoined upon him by statute, and in assuming his official position he engages to perform that duty. It is as much his duty to attend the sessions of the board when it is engaged in hearing and determining matters pertaining to the construction, repair, etc., of gravel roads, and to keep a record of such proceedings, as it is his duty to attend the sessions of the board when it is engaged in the examination and allowance of claims against the county, in passing upon applications for liquor licenses, in acting upon petitions for the location or vacation of highways, or any other business connected with such board, and to keep a record of such proceedings. If a county auditor is entitled to extra compensation for acting as clerk of the board of commissioners while such board is engaged in the discharge of the duties pertaining to the construction of gravel roads, by the same course of reasoning we must reach the conclusion that he would be entitled to extra compensation for attending the meetings of the board and keeping a record of its proceedings when engaged in the dispatch of its business pertaining to any of its enumerated duties. To put such a construction upon the law would create such an endless chain system of extra compensation to public officers as would put to blush the most greedy official, and destroy the commendable work of the legislature, which for years has been to erect a barrier, by its wise and just laws, against just such attacks as this upon the public treasury. I am convinced, from an examination and consideration of all the laws regulating the fees and salaries of county officers, that the claim of the auditor of Lawrence county, as described

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in the indictment, was unauthorized by any law now upon the statute books, and was, therefore, an illegal and unlawful claim, and should not have been allowed.

The next inquiry naturally and logically leads me to the consideration of the question, was the allowance of such claim by the appellees, acting as a board of county commissioners, an unlawful act, within the meaning of the statute, upon which the indictment rests? Appellees were bound to know that the claim of the auditor, upon which they were called upon to act, was an illegal claim, and hence not binding upon the county; for they are presumed to know the law, and as I have shown there is no warrant in the statute in justification or support of the claim. There is but one theory upon which appellees can be relieved from criminal liability under the charges in the indictment, and that is that, in the allowance of the claim, they acted in a judicial capacity, and for a judicial action, although, in contravention of a criminal statute, a prosecution will not lie. Indeed, I am told by counsel in their brief, that it was upon this theory alone that the trial court sustained the motion to quash. I can not believe that this theory can be successfully maintained. In the first place, if it can, the statute, §7853 Burns 1894, is nugatory, inoperative, and ineffectual. When a claim is filed in the auditor's office against the county (and the law requires all such claims to be so filed) it can only be disposed of in two ways; (1) by the voluntary withdrawal of it by the claimant, or (2) by an action of the board either in allowing or disallowing it.

Statutes are not passed for idle or meaningless purposes, and when the legislature declared, as it did in the section just referred to, and §6548 Burns 1894, that it should be unlawful for any board of county commissioners to make any allowance to any county, etc., officer, "not specifically required by law," "unless in cases of indispensable public necessity," etc, and "except when the statutes confer the clear and unequivocal authority to do so," it meant to define

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a crime against the public, and to provide a punishment adequate to the crime. If members of a board of county commissioners can shield themselves from an act declared by the legislature to be a crime, by claiming that they acted in a judicial capacity, then all restrictions as to their powers in the allowance of claims might as well be removed. As I have seen, a board of commissioners is a creature of statute. This being true, it has no authority beyond that expressly given by statute. It necessarily follows that when a claim is presented to it for allowance, and there is no statute which gives it validity, there exists no authority or power to allow it. There being no such authority, it can not assume or usurp judicial functions to sanction the individual acts of its members, or to protect them from criminal liability.

In *Waymire v. Powell*, 105 Ind. 328, the court, by Mitchell, J., said: "The compensation of officers is, as a rule, prescribed by law, and it has often been declared by this court, that before any public officer may demand or receive compensation out of the public treasury for services performed by him, it is required that he show: 1. That a specific compensation is allowed by law for the services for which remuneration is claimed. 2. That express authority exists for making payment out of the public funds." Citing *Noble v. Board, etc.*, 101 Ind. 127; *Board, etc., v. Gresham*, 101 Ind. 53; *Board, etc., v. Harman*, 101 Ind. 551; *Bynum v. Board, etc.*, 100 Ind. 90; *Wright v. Board, etc.*, 98 Ind. 88. "In the case of *Board v. Gresham, supra*, this court said, in reference to the rule above stated: 'It is of the highest concern to the public that this should be so; otherwise it would be within the power of one body of county officials to compensate the other county officers out of the public treasury, as a matter of grace and favor, without limit or restraint.' " In the case from which I have just quoted, it was held that county commissioners can not compensate other county officers for official services without express authority of law.

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This court, in *Board, etc., v. Nichols*, 12 Ind. App. 315, had under consideration the question as to what capacity a board of commissioners acted, in considering and allowing a claim against the county, and it was there said: "The board in hearing such claim, acts merely in the capacity of an auditing committee. Its action is ministerial and not judicial. Any order made by it in allowing or refusing to allow the claim does not rise to the dignity of a judicial determination or judgment." The case of *Board, etc., v. Heaston*, 144 Ind. 583, is instructive upon this point. In that case, Jordan, J., said: "We have seen that * * * the board is the agency of the county for the transaction of its business. A portion of this business is the auditing and allowing of 'legal claims.' We are of the opinion, and are constrained to hold, that when the board examined into and allowed the claims presented to them by appellee, it stood in the eye of the law as the representative of its county, and thereby acted in its administrative capacity, and not in the character of a court; that while its order so made might be termed *quasi-judicial*, yet it did not attain to the rank of a judicial determination or judgment so as to bring it under the protection of the rule *res judicata*. The fact that the statute pertaining to the auditing of claims, grants an appeal to the circuit court at the option of the claimant, lends no force to the contention that the board acts as a court in allowing the same." In other states, the same rule obtains, and it is held that the allowance of a claim by the board is not *res judicata*. *Commissioners, etc., v. Keller*, 6 Kan. 510; *Board, etc., v. Catlett*, 86 Va. 158; *Abernathy v. Phifer*, 84 N. C. 711.

In *Myers v. Gibson*, 152 Ind. 500, while the question was not directly presented, yet in the decision the doctrine announced in the cases above cited was discussed and approved. In that case, in addition to referring to and approving the rule that in the allowance of a claim a county board acts in its executive and administrative and not in its judicial ca-

capacity, Monk, C. J., said: "It is settled law that a board of commissioners in this State has no powers, except such as are expressly given by statute, and such as are necessary to the exercise of the powers expressly given; and the powers so given are limited and must be exercised in the manner provided by statute." Citing, *Myers v. Gibson*, 147 Ind. 452; *Board, etc., v. Pollard*, 17 Ind. App. 470.

In *Board, etc., v. Buchanan*, 21 Ind. App. 178, the rule that a board of county commissioners, in allowing a claim against the county, acts in an administrative and not a judicial capacity was recognized by holding that the allowance by the board of illegal fees to a county clerk was no defense in an action by the county to recover such fees. In that case, Robinson, J., said: "The fact that the claim for the fees in question was filed before the board of county commissioners and was allowed and paid accordingly, constitutes no defense to this action. The Supreme Court has held that the board of commissioners can not bind the county by allowing an unlawful claim, and that the payment of such a claim in defiance of a statute, is not a payment by the county within the rule that a payment under mistake of law can not be recovered." Citing *Board, etc., v. Heaston*, 144 Ind. 583. These authorities negative the theory that the appellees acted in a judicial capacity.

The two sections of the statute we have under consideration, §§7853, 6548, Burns, 1894, relate to the same subject-matter and should be construed together. They differ only in verbiage, and that in the former a penalty is prescribed, while in the latter the penalty is omitted. The former is more elastic, in that in cases of indispensable public necessity, to be found and entered of record, the board may be authorized to make allowances which are not specifically provided for by law. In the former, also, the respective officers are named to which allowances are prohibited which are "not specifically prescribed by law", while in the latter the prohibition goes to "any county, township or

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other public officer", as to the allowance of a claim, "except when the statutes confer the clear and unequivocal authority to do so." By both of the sections, the act of making unauthorized or unwarranted allowances is made unlawful. Construing these two sections of the statute together, I have no trouble in applying the facts charged in the first count of the indictment to them in reaching the conclusion that such facts constitute a crime within their meaning sufficient to put appellees upon trial. I have considered these two sections of the statute in conjunction, for the reason that jointly they fully and forcibly express the legislative intention to make the act complained of a crime, and while a penalty is only prescribed by section 7853, *supra*, it is now the settled law in this State, that where a statute makes an act unlawful, but fails to provide a penalty, we may look to another statute for the penalty, if such there be. See *State v. Buskirk*, 20 Ind. App. 496.

The law in force until March 11, 1895, allowed county commissioners to employ and pay a clerk, whose duty it was, under the statute, to record all proceedings of the board when acting in the capacity of gravel road directors, in a book provided for that purpose. §6868 Burns 1894. This law, however, was repealed by the act approved March 11, 1895. Acts 1895, p. 362. After the passage of the act of 1895, the board of county commissioners had no authority to employ a clerk. The charge in this case, however, is not in the employment of a clerk in violation of the statute, but in making an allowance to a county auditor for extra services—for services which he was bound to perform by virtue of his office—and in the absence of an indispensable public necessity found by the board to exist and entered upon its order-book. The question has been put at rest in this State, that a board of county commissioners can not make such an allowance to a county auditor in the absence of such finding.

In *Nowles v. Board, etc.*, 86 Ind. 179, the Supreme Court

said: "In addition to this the 39th section provides, that 'The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of their orders, make no allowance not specifically required by law to any county auditor', and makes a violation of this provision a misdemeanor. These services were not found to be, nor were they in fact, such services as are contemplated by the above section, and as their payment is not specifically required it follows that the payment is prohibited, and that no recovery can be had for them. These services must be deemed a part of the services for which the salary is allowed, and that sum must compensate the appellant."

In *Wright v. Board, etc.*, 98 Ind. 88, appellant, as auditor, filed a claim against the county for services rendered in the establishment of a free gravel road. In passing upon the validity of the claim, the court said: "Where a fixed salary is provided by law, and fees for services are specifically designated, the officer can rightfully claim no other compensation. Unless a statute expressly, or by fair implication, makes provision for compensation, a claim can not be enforced by legal process against the county except where there is a contract stipulating for the services, and the contract is itself within the authority of the county commissioners." See, also, *Wright v. Board, etc.*, 98 Ind. 108; *Stropes v. Board, etc.*, 84 Ind. 560.

In the case of *Board, etc., v. Barnes*, 123 Ind. 403, the board of commissioners declared that "an indispensable public necessity exists during the construction of free gravel roads in Tippecanoe county, whereby the auditor is compelled to perform a large amount of extra labor, for which no compensation is allowed by law." In view of this extra labor, an indispensable public necessity was declared for extra compensation to the auditor. Notwithstanding this declaration, the Supreme Court held that the auditor could not recover, and in so holding, said: "A board of county

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commissioners can not add to its power nor give effect to an unauthorized act by any declaration of its own. It can not make a question of power one of expediency by any assertion or recital. Cobwebs of that sort will be swept away by the courts, and the action of the tribunal so thoroughly examined and explored as to enable the courts to determine the true character of the act or transaction. What can not be accomplished directly can not be accomplished by indirection. Declarations will not be permitted to conceal or cover the proceedings, for the courts will strip off covers and ascertain the real nature of the transaction. We do not, therefore, attach any importance to the recitals in the orders before us, but, putting them aside, we look only to the real act performed by the board. We have no difficulty in ascertaining the real character of the act in this instance, for the purpose sought to be accomplished is transparent. No one can doubt that the purpose of the board of commissioners was to add to the fees of the county auditor. The question, therefore, is, has a board of commissioners power to add to the fees of the auditor of the county? We know that comprehensive powers are conferred upon county commissioners; we know, too, that they are, in a sense, the county. But, after all, the county is no more than a public corporation, created by statute and deriving its powers from the legislature. If a county is not given power to fix the fees of public officers by statute, it can possess no such power. It adds nothing, therefore, to the strength of the appellee's position to affirm that the board of commissioners is the county. But it is not strictly true that the board is the county. It can by no possibility be true that the board is the county, for, in a just sense, the inhabitants of the organized locality constitute the county. In strict accuracy the commissioners are public officers representing the county, with powers and duties defined and prescribed by statute. The money which they control is the money of the county, the debts which they incur are the debts of the county, and

the authority they exercise is such as resides in them as the officers and representatives of the county. But the source of their power is the statute, and the standard by which it is to be measured is that supplied by the legislative enactments. It is true, as we have suggested, that the grant of a principal power carries by implication such subsidiary powers as are necessary to effectuate the principal power, but the authority to fix the fees of a county officer is not a subsidiary power, nor can it be, since the regulation of the fees and salaries of elective officers is a matter of principal importance in every instance. Our own cases declare that a public officer is not entitled to any other compensation than that fixed by the legislature itself, or by some officer or body to whom authority to fix the compensation has been delegated."

In *Lee v. Board, etc.*, 124 Ind. 214, a like question was presented, and in deciding it the court said: "The practical question in this, and all other cases of this class, is, was the work for which the public officer asks compensation out of the public treasury, such as is embraced in the general duties of his office, and for which the law provides compensation? If it was, manifestly the commissioners had no power to add to the compensation prescribed by the statute; if it was not, then it is pertinent to inquire whether the county commissioners have power to supplement the provisions made by the legislature, by adding new duties to a public office, and fixing compensation for the added duties by contract with the officer. Until it can be shown that county boards are invested with power to supply what may be regarded as defects or deficiencies in the law, by enlarging the duties of county officers, and providing compensation for what may be deemed to be extraordinary services, claims of the character of that in question can receive no countenance from the courts. In view of the uniform decisions of this court, from its earliest organization until now, and of the prohibitory legislation concerning allowances, which looks in the

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face of county boards at every turn, it is a matter of surprise that it should be supposed that an inferior tribunal, possessed of limited jurisdiction, such as is committed to boards of commissioners, was the repository of such general and extraordinary power." See, also, *Board, etc., v. Johnson*, 127 Ind. 238; *Waymire v. Powell*, 105 Ind. 328.

In the case of *Board, etc., v. Buchanan*, 21 Ind. App. 178, this court held that a public officer takes and holds his office for the compensation stipulated by statute, whether the duties of the office be increased or diminished. In the same case it was held that an illegal claim for fees allowed to the clerk of the circuit court by the board of commissioners would not constitute a defense to an action by the county to recover back such fees. Under the statute and the authorities, the claim described in the indictment, and which was allowed by the appellees, acting as a board of commissioners, was an illegal, unfounded, and unwarranted claim. It can not be upheld upon any hypothesis. It is charged that appellees unlawfully and wrongfully allowed this claim, and that the duties performed by the auditor, upon which the claim was founded and allowed, were and are duties which he was and is legally required to perform as a part of the duties of his office without extra compensation. The appellees urge that the first count of the indictment does not charge that the allowance made to the auditor was not made as a part of his salary. This was not necessary. It does charge that the claim presented was for extra services performed pertaining to free gravel roads, and that such claim was illegal and wholly unwarranted. This shows that the claim was for extra work, and it necessarily follows that it was no part of the auditor's salary, which is fixed by law, and the commissioners do not have to allow it.

It is further urged that the indictment is not good because it does not charge fraud or corruption. I can not believe that such omission makes the indictment bad. It charges a specific violation of a statutory crime in the substantial lan-

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guage of the statute. It charges that the appellees wrongfully and unlawfully made an allowance to a public officer, the county auditor, without first performing mandatory steps required by law, and which the law says shall be punished criminally. The public money may be given away without either fraud or corruption, and yet be a violation of the law, and for such violation a prosecution will lie. It has many times been held that an indictment which substantially follows the language of the statute in defining a crime, etc., is sufficient. Of the many authorities so holding, I cite the following: *Stewart v. State*, 111 Ind. 554; *Benham v. State*, 116 Ind. 112; *Graeter v. State*, 105 Ind. 271; *State v. Miller*, 98 Ind. 70; Gillett on Crim. Law, §132a.

It may be suggested that the indictment is not sufficient in substance and form, for the reason that it does not appear that the services of the auditor, for which he was allowed, were not rendered in some other capacity than that of auditor, for which he was entitled to compensation. The indictment does charge that the services for which he was allowed were the services which were required of him to be performed as such auditor. This can not be a conclusion of law, but a statement of a substantive fact. The duties of a county auditor are prescribed by law, and one of those duties is to act as clerk of the board and to keep its record. The only service he could perform for the county in such capacity was to act as clerk for the board and keep a record of its proceedings while it was engaged, as such board, in the transacting of its business pertaining to gravel roads. If the appellees were acting in the capacity of a board of county commissioners, which the indictment avers they were, and if the services for which the auditor charged were for services performed in his capacity of clerk of such board, which the indictment says he was, then it precludes the idea that either the board or the auditor was acting in any other capacity. It follows as a necessity that the appellees were

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not acting as a board of gravel road directors, and that the services for which the auditor was allowed were not performed by him as clerk of the board of gravel road directors. The statute, §6868 Burns 1894, prior to its amendment in 1895, made the board of county commissioners *ex officio* a board of gravel road directors, but it did not make the auditor *ex officio* clerk of such board. It authorized the board of gravel road directors to appoint a superintendent and a clerk. They were required to keep a record of their proceedings in a book provided for that purpose by the county commissioners, and it was the duty of the clerk appointed by them to keep such record, and for his services he was to receive not to exceed \$1.50 per day for the time actually employed by him. There was no requirement of the statute that the board of gravel road directors should employ the auditor as clerk, and there is no presumption that they did in this instance, for they were authorized to employ any "suitable person." The act constituting the board of commissioners a board of gravel road directors went into effect March 24, 1879. See Acts 1879, p. 226, §6868 Burns 1894. In 1895, §6868, *supra*, was amended, and all that part relating to the employment of some "suitable person" to act as clerk, and defining his duties, was eliminated: Acts 1895, p. 362. So as the law now is, and has been since March, 1895, the board of gravel road directors have no authority to employ a clerk. It might be suggested that the services for which appellees, acting as a board of county commissioners, allowed the auditor, might have been for services rendered by him as clerk of the board of gravel road directors, under an appointment, and before the law was amended in 1895, and that the indictment should have negatived such facts. It indeed would be a stretch of the imagination and a forced construction that would lead to such conclusion. When the indictment avers that the services for which the auditor charged and was allowed were services which he was required to perform by virtue of his

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office as auditor, and when we remember that the auditor's salary is fixed by law, and that the statute specifically provides that he "shall receive no other compensation whatever," it would be absurd to hold that because the indictment did not negative these facts it should be held as not charging a crime.

Another rule of construction in criminal law is that no greater certainty is required in criminal than in civil proceedings. *McCool v. State*, 23 Ind. 127. Certainty to a common intent is all that is required in criminal pleadings, and an indictment need not be more certain than a civil pleading. *Lay v. State*, 12 Ind. App. 362; *State v. Sarlls*, 135 Ind. 195.

Reverting again to the question of pleading an exception or negating a state of facts to which the indictment does not apply, it seems that the rule is firmly established that it is unnecessary to plead such exception or negative, except where there is an exception in the statute defining the offense, then the indictment must negative the exception. The law in relation to pleading exceptions in criminal pleading is that if the exception is contained in a subsequent clause or statute, it is a matter of defense, and need not be negated in the indictment. This rule applies even where the exception is created by a proviso in the statute.

In *Russell v. State*, 50 Ind. 174, it was said: "The law in relation to exceptions in a statute is, that if the exception be contained in a subsequent clause or statute, it is a matter of defense and need not be negated in the indictment." In referring to that case and quoting the language above used, the Supreme Court, in *State v. Maddox*, 74 Ind. 105, said: "This, we understand, is the settled rule of law on the subject now under consideration." Citing Archibald's *Crim. Pr. & Pl.* (8th ed.) p. 361. The case of *Hewitt v. State*, 121 Ind. 245, was a prosecution for killing a dog. The statute, §2852 Burns 1894, makes it a misdemeanor to mischievously kill a dog that has been listed for taxation. This

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section of the statute contains a proviso to the effect that it does not apply if the dog, when killed, was engaged in committing damages to the property of any person other than its owner, or if it is known to be a dog that will kill sheep, etc. It was urged that the indictment was not good, and one of the objections to it was that the exception contained in the proviso was not negatived. In deciding the point, Mitchell, C. J., said: "It will be seen that the exception is in a substantive clause embraced in a proviso, and not in the clause of the statute which declares and defines the offense. The indictment is good, therefore, within the established rule that 'Where an offense is created by statute, and an exception is made, either by another statute or by another substantive clause of the same statute, it is not necessary for the prosecutor, either in the indictment or by evidence, to show that the defendant does not come within the exception; but it is for the defendant to prove the affirmative and which he may do under the plea of not guilty.' " To the same effect is the case of *Mergentheim v. State*, 107 Ind. 567. But in the case before us there is no proviso in the statute, or in any other statute, creating an exception. The offense of which appellees are charged is plainly defined by the statute, and the language used in defining the offense is plain, clear, and unequivocal. There is no hidden meaning in it. The statute simply says that it shall be unlawful for the board of commissioners to do a certain thing, and the indictment charges that they did the very thing which the statute has defined as an offense, and the charge is in the substantial language of the statute. I do not conceive it to be a duty of the court to search other statutes to see if there is not some remote or contingent provision therein contained whereby it might appear that the county auditor had performed some extra or other service not specifically enjoined upon him by virtue of his office, and in some other capacity, for which the commissioners might be authorized to make him an allowance out of the public treasury. If such a contingency

exists, then it could be pleaded as a defense, but it never has been held, either in criminal or in civil proceedings, that the complaining party must not only state the facts upon which he rests his case, but must also state the facts upon which his adversary may rest his defense. Under the rule, which is unvarying, in this State, and adhered to by all the text-writers, the indictment did not have to aver any facts tending to show that the appellees might make a successful defense upon the provisions of some other statute.

It follows from this that it was not necessary to charge in the indictment facts showing that the services performed by the auditor were not other services not required to be performed by him. If such a condition existed, appellees might base a defense upon it, but in my judgment the indictment did not have to show such condition. Having expressed my views upon the general principles involved and the law as generally applied to the facts charged, I will now briefly review the prevailing opinion, and attempt to show why, in my judgment, my associates have reached a wrong conclusion. The prevailing opinion rests upon four propositions: (1) That the material matters alleged in the indictment are not directly alleged, but stated by way of recital; (2) that it does not appear, except by inference, that the party named as auditor was such auditor at the time the services were rendered; (3) that the averments are not sufficient to bar another prosecution for the same offense; (4) that the indictment does not state the facts which constitute the definition of the offense in the statute so as to bring the defendants within it.

The rule is correctly stated in the prevailing opinion, that material matters in criminal pleadings must be directly alleged and not stated by way of recital; but the rule here is, in my judgment, misapplied. The opinion says that the allegations as to the necessity for the allowance and as to its specific requirements by law are by recital and not by direct averment, because the words "illegal" and "unwarranted"

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are conclusions of law, and do not describe the offense attempted to be charged. Section 7883 Burns 1894, forbids the allowance of any claim by the board of commissioners to a county auditor and other officers named, not specifically required by law, except in cases of indispensable public necessity, which indispensable public necessity shall first be found and entered of record. Section 6548 Burns 1894, declares that it shall be unlawful for such board to allow any county or other public officer any sum of money out of a county treasury except when the statute confers the clear and unequivocal authority to do so. Now the first count of the indictment charges that the appellees were members of the board, and that while acting as such, unlawfully and wrongfully allowed a specific claim to a county auditor; that there was no indispensable public necessity for such allowance; that no such necessity was found and entered of record; that such allowance was not specifically required by law; that such allowance was unlawfully made for certain pretended services in the performance of certain duties, to wit, extra work on account of gravel roads as clerk of board, etc. The violation of any criminal statute is an unlawful act, for it is in defiance of law. The indictment says the act charged was unlawful and wrongful. The words "illegal" and "unwarranted" used in the indictment do not, in my judgment, add to or take from it. If an act is unlawful, it is both "illegal" and "unwarranted," and it seems plain to me that this is the sense in which they are used in the indictment. In an indictment for assault and battery, it is sufficient to charge the act as being done unlawfully. There is just as good reason for saying that that would be stating a conclusion and not a material fact, as to say here that the facts before us state a mere conclusion. To my mind, every essential and material fact constituting the offense as designated by the statutes is specifically and clearly stated in the indictment. (2) It is urged in the prevailing opinion that it does not appear from the indict-

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ment that the party named was the county auditor at the time the services were rendered. Concede, for the argument, that there is no direct averment that he was such auditor, yet every reasonable inference shows that he was. Malott is referred to, named, and described as the "duly elected, qualified and acting auditor." The pretended services for which he was allowed was for "extra work on account of gravel roads as clerk of board for thirty-two months," etc. I have shown in the former part of this opinion that a county auditor is *ex officio* clerk of the board of commissioners. I have also shown that until the act of 1895, the board of commissioners, while sitting as a board of gravel road directors, were authorized to employ a clerk to keep the record, and to pay such clerk a fixed *per diem*. He was not to be paid so much per month, but so much per day for every day actually so employed. Now the indictment charges that the allowance was made to him for pretended services as clerk of the board, and not as clerk of the gravel road directors. If the claim had been for services as clerk of the gravel road directors, it would have been for a fixed number of days at a fixed *per diem* as designated by statute. The only way a county auditor can act as clerk of a board of county commissioners is to act by virtue of his office, and this duty is enjoined upon him by statute, and the statute, as I have shown, fixes his salary and specifically says that he shall receive "no other compensation whatever." It seems to me, therefore, that no reasonable construction can be placed upon the language used which would lead to any other conclusion than that it definitely and clearly shows that Malott was auditor at the time the services were rendered for which he was allowed. I can not believe that courts should resort to fine technicalities and hair-splitting distinctions to shield public officers who have betrayed the trust confided to them, when in plain violation of a law enacted out of public necessity they have unlawfully and wrongfully plundered the public treasury, as was plainly

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done in this case, as shown by the indictment. It seems to me a mere subterfuge to say that the indictment does not show that the allowance was made out of the moneys of the county, as is said in the prevailing opinion, and for this reason, it is bad. Courts take judicial knowledge of the laws of the State, and are bound to know that a board of county commissioners can not make an allowance except out of the moneys of the county they represent. It is provided by statute that "neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment." §1739 Horner 1897. This was also the rule at common law. A board of commissioners is, in a large sense, the fiscal agent of the county. In financial matters they do not have jurisdiction over any funds except the county's, and hence, in making an allowance, it is not necessary to enter as a part of the order that it is to be paid out of the county treasury, for it follows as a matter both of law and fact. In §7853 Burns 1894, the legislature did not see any necessity for expressing in the statute that the county commissioners should not make any allowance, etc., to be paid out of the moneys of the county. The legislature knew, as courts must know, that that is the only way such allowances could be paid, and it was useless so to express it in the law. The board could not have made an effective order to pay the allowance out of any money over which they had no control, and as the only funds at their disposal were the county funds, it follows as a logical and legal conclusion that the allowance was to be so paid, and hence the averments are amply sufficient in this respect. (3) That the averments are not sufficient to bar another prosecution for the same offense. I am unable to see any merit in this contention. Succinctly stated, the indictment shows the following material facts: That appellees were members of the board of county commissioners; that Malott was auditor of the county; that on November 27, 1897, appellees, while sitting and acting as such board, unlawfully voted for and

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allowed said Malott as such auditor the sum of \$500 for extra work, etc., as clerk of the board, etc.; that there was no indispensable public necessity for such allowance; that no such indispensable public necessity had been found and entered of record; that such allowance was not specifically or otherwise required by law; that said claim was for pretended services rendered, etc., and that the duties performed by said Malott for which said claim was filed, pretended, and allowed, were and are duties which he was legally required to perform as a part of the duties of his said office, without extra pay, etc. The facts thus stated are all plain and distinct. They definitely designate the date of the allowance and all the acts constituting the offense. The facts are in perfect harmony with the statute. The offense is defined in almost the exact language of the statute, and the acts constituting the offense are clearly stated. All that is required in a criminal charge is that it should be prepared with that degree of certainty that the court and jury may know what they are to try, and to acquit the defendant of or punish him for; that the defendant may know what he is to answer to, and that the record may show, as far as may be, for what he has once been put in jeopardy. *Whitney v. State*, 10 Ind. 404; *McLaughlin v. State*, 45 Ind. 338; Gillett on Crim. Law (2nd ed.) 125. The law does not require that minute facts be stated so as to save the defendant the necessity of introducing parol evidence to show the identity of the offense charged on a plea of former jeopardy. *State v. Malone*, 8 Ind. App. 8.

To my mind the indictment is sufficient under the general provisions of §1755 Horner 1897. It is there declared that the indictment will be sufficient if it can be understood therefrom (1) that it was found by the grand jury; (2) that the defendant is named; (3) that an offense was committed within the jurisdiction of the court, or is triable therein; (4) that the offense charged is clearly set forth in plain and concise language; (5) that the offense is charged with

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such a degree of certainty that the court may pronounce judgment upon conviction. It seems to me that all these requirements are embodied in the indictment in this case. §1756 Horner 1897, after enumerating certain defects for which an indictment shall not be quashed, provides in subdivision ten that it shall not be quashed "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." I am utterly unable to see how the substantial rights of the defendants (appellees) could be prejudiced in a trial under the indictment upon the facts, on the merits of the case, and for the reasons given and the authorities cited, I am led to the conclusion that the averments of the indictment are sufficient to bar another prosecution for the same offense. (4) As to the fourth reason urged against the sufficiency of the indictment in the prevailing opinion, what I have said as to the facts stated in defining the offense is applicable, and I will not notice it further.

The whole question here resolves itself to this proposition: The salary of the auditor was fixed by law; he was not entitled to any extra fees or other compensation; the appellees, acting as a board of commissioners, unlawfully allowed him \$500 out of the public treasury, and thus increased his salary to that extent in plain violation of the statute. The indictment, it seems to me, shows these facts with sufficient certainty, and the motion to quash should have been overruled.

ROSS v. THE UNION CEMENT AND LIME COMPANY.

[No. 8,216. Filed November 2, 1900.]

MASTER AND SERVANT.—*Action by Quarry Employe for Personal Injuries.*—*Fellow Servant.*—Plaintiff was employed to keep the floor of a quarry tunnel free from small rocks, under the direction of defendant's foreman. The rocks to be cleared away were such as would be thrown out from time to time by blasting. Two days before plaintiff was injured, a large rock was thrown out by a blast and was

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supported in a dangerous position by smaller rocks thrown out in the same manner. Some of the loose rocks supporting the large one were removed by the foreman, and while plaintiff was working in the line of his duty the stone fell on and injured him. *Held*, that the foreman was a fellow servant of plaintiff, and that there could be no recovery.

From the Floyd Circuit Court. *Affirmed*.

Evan B. Stotsenburg, for appellant.

M. Z. Stannard, for appellee.

BLACK, J.—This was an action commenced in the Clark Circuit Court, from which, after an issue had been formed by an answer in denial, the venue was changed to the court below, where upon trial by jury a general verdict was returned in favor of the appellant, who was the plaintiff. With the general verdict the jury returned answers to interrogatories, and the court sustained the appellee's motion for judgment in its favor upon the special finding of facts, and gave judgment accordingly.

The complaint, after preliminary averments, showed that the appellant was employed by the appellee to work as a laborer in its quarry, consisting of tunnels, shafts and mines in the ground, his duty consisting of loading stone into cars and of keeping the floor of the quarry clear and free from small rocks and spawls; that on the 23rd of May 1898, the appellee without the knowledge of the appellant left a large rock in the tunnel, standing on a loose foundation of broken stones; that said rock weighed about 1,000 pounds and was not propped or in any way protected from falling, and it had been so suffered to be and remain in said condition for forty-eight hours before the appellant was injured as hereinafter stated; that the appellant had no knowledge of the dangerous position or condition of said rock, but while he was engaged in the business of cleaning up the floor of said tunnel, under the order and direction of the foreman of the appellee, and without any fault of the appellant, said rock, being without props or other ap-

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pliances to prevent it from falling, fell over upon the appellant, crushing and pinning him to the ground, etc., his injuries being stated, etc.

No question in relation to the pleadings is presented. The facts specially found by the jury in answer to interrogatories were in substance as follows: The appellant when injured was working in the appellee's tunnel, and had worked at loading stone for five weeks before that time. He had worked at loading rock in cars in the open face quarry before working in the tunnel, and he had worked at picking up loose stone from the floor of the tunnel and placing the same in cars for three weeks before the injury. It was the custom of the appellee to blast rock in its tunnel by means of explosives. The blasting threw quantities of loose rock on the floor of the tunnel, and it was the appellant's duty, when a quantity of rock had been thrown out on the floor of the tunnel by means of blasts, to load portions of said rock into cars. He had been engaged in loading into cars loose rock thrown on the floor of the tunnel by means of blasts for three weeks before the date of his injury, and he was so engaged when injured as complained of. The rock which fell upon and injured the appellee was thrown out by one of the blasts. It stood on edge supported by other loose rocks thrown out by the blasts. The appellant was loading rock in a car near this stone for two hours before he was injured. In loading loose rock into cars, the appellant, before he was injured, picked up loose rock from the floor of the tunnel near the point where the rock stood which fell upon and injured him. In cleaning the floor of the tunnel before the stone fell, the appellant did not remove any portion of the loose rock supporting the stone which fell upon and injured him, and it was not his act in removing a portion of the loose stone which supported the stone which fell upon him that caused it to fall. In cleaning the floor of the tunnel, Frank Woerle, appellant's boss,

removed a portion of the loose rock supporting the stone which fell upon and injured the appellant, and it was the act of the appellant's boss, Frank Woerle, in removing a portion of the loose stone which supported the stone which fell upon the appellant that caused it to fall. The jury answered, "unknown," to the question, "Would the stone which fell upon plaintiff have continued to stand in its upright position if none of the loose stone supporting it had been removed?" A like answer was returned to the question, "Would the stone which fell upon the plaintiff have continued to stand in its upright position, without props or other appliances to prevent it from falling, if the loose stone on which it was standing had not been removed?" It was further found specially, that Lewis Girdler was the general superintendent in charge of the appellee's mill, quarries and tunnels; that Peter Eagan was the foreman in charge of appellee's quarries and tunnels, and that Frank Woerle was the boss of the crew with which the appellant was working at the time he was injured; that Frank Woerle, in acting as boss in the tunnel, acted under the order of Peter Eagan, the foreman of appellee's quarries and tunnels, and that Peter Eagan, in acting as foreman of appellee's quarries and tunnels, acted under the orders of Lewis Girdler, the appellee's general superintendent; that Frank Woerle, did not, in addition to acting as tunnel boss, on the day the appellant was hurt and before he was hurt, assist the appellant and the other loaders in loading cars; that Frank Woerle, in addition to acting as tunnel boss, on the day appellant was hurt, and before he was hurt, did assist the sledgers in sledging stone; that it was the duty of the crew of men working under tunnel boss Woerle to break up and remove the stone which fell upon and injured the appellant; and that the appellee's tunnel was lighted by electric light.

In all matters as to which the special findings are silent, no inference may be indulged against the general verdict;

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and to override the general verdict, the special findings as to some material fact or facts expressly found must be irreconcilably inconsistent with the general verdict, in favor of which all inferences must be indulged that might legitimately be drawn from any evidence admissible under the issues tried, except so far as expressly modified and controlled by the special findings.

The action was one at common law, and not under the statute relating to the liability of corporations for personal injuries to their employees. It proceeded upon the theory that the employer was responsible by reason of failure to provide a reasonably safe place for the employe in which to work; and the question presented by the appellee's motion for judgment is whether the special findings show that the appellant's injury was occasioned, not by such fault of the appellee, but through the act or omission of a fellow servant while serving as such, or from other cause the danger from which was assumed by the appellant as an ordinary risk of the service.

It is a familiar doctrine, upon which we need not here enlarge, that the employer, in this instance a corporation and therefore acting only through officers, agents and employes, can not be relieved of the duty of providing reasonably safe places and appliances for the work of the employe by casting it upon the employer's officer, agent or servant, and that where this duty is so entrusted the agent's negligence is that of the master.

It is alike familiar law, that a master is not liable to one of his servants for injuries sustained by the latter through the negligence of a fellow servant or any other assumed risk, and that servants engaged in the same general line of duty are fellow servants though one may be superior and the other subordinate and under the immediate direction and control of the former.

The special findings account for the manner and method in which the stone which fell upon the appellant came to be

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in its situation, position and condition of dangerousness in the tunnel, and also for the immediate cause of its fall. It was thrown into its place by blasting, which was an ordinary method of carrying on a part of the general work in which the appellant was one of the employes. That such a rock should be thus put in such a place was not a part of furnishing a place to work by the master, in the sense of the rule above mentioned, but was a part of the work to be done in the tunnel, within the scope of the business in which the appellant was engaged. No fault could be attributed to the master with relation to the servants thus engaged from the mere fact that such a rock was thus cast into such a situation and position.

The inquiry then is narrowed to the question whether the tunnel boss, Woerle, in removing a portion of the loose rocks, whereby the large stone was caused to fall, was representing the master in providing a place to work or was engaged in the performance of his work as a co-employee or fellow servant of the appellant. Though superior in rank to the appellant, Woerle could not be regarded as acting as a vice-principal, if he appears not to have such authority in the premises, but to have been, in the act in question, acting as a servant of the appellee engaged in the same general line of duty with the appellant.

The large stone thrown out by the blasting and the loose rocks supporting it and in its neighborhood constituted material on which it was the duty of employes to perform labor in the general employment of preparing stone for the manufacture of cement, in which general employment the appellant was engaged at work with others, the services of all of them in various capacities being directed to the accomplishment of one general result; and the act of one of these employes in the course of his employment in this common work caused the large stone to fall over when the appellant, engaged in his part of the same general employment, was so situated that the stone fell upon him.

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The position of the stone and the manner in which it was supported, constituting parts of the ordinary exigencies of the general work, were not made to appear to the jury to have rendered the place unsafe, as alleged in the complaint, but the stone was caused to fall by the removal of a part of the support by the fellow servant in performing work like that in which the appellant was engaged, clearing the floor of the tunnel, and not in performing work under an employment to prepare a place for the appellant to occupy in the performance of other work of a different character.

What was done by Woerle in the premises was not done by him as the representative of the appellee, so far as the appellant was concerned; it was not done in the discharge of a duty which the appellee owed to the appellant; it was not an act in the performance of what the appellee as master was bound toward the appellant to perform, but it was an act done in the performance of Woerle's service in the capacity of a co-employee of the appellant; and for the manner in which the employees in the tunnel performed the work in which they were engaged in common there the master was not responsible to any of them. See *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Brazil, etc., Co. v. Cain*, 98 Ind. 282; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181; *Justice v. Pennsylvania Co.*, 130 Ind. 321.

Judgment affirmed.

HAAS v. THE C. B. CONES & SON MANUFACTURING COMPANY.

[No. 3,256. Filed November 2, 1900.]

EVIDENCE.—Notice.—Where, in an action for the purchase price of goods sold, defendant claimed he had disposed of his store and business in connection therewith prior to the sale of the goods, evidence as to a publication of a notice of the sale of the store, in a newspaper, in the town in which the store was located, was properly excluded, it not being shown that plaintiff, a non-resident, had notice of such publication, or any opportunity of seeing a copy thereof. pp. 470, 471.

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APPEAL AND ERROR.—Evidence.—The ruling of the court in excluding testimony will not be reversed on appeal if the ruling can be sustained upon any theory, whether advanced at the time of the ruling or not. *p. 471.*

SAME.—Jury.—A judgment in an action on an account will not be reversed because the jury took to their room the complaint, with which was filed a verified bill of particulars, at the end of which was a memorandum of interest due on the account, where the proper amount of interest was included in the verdict. *p. 471.*

From the Tipton Circuit Court. *Affirmed.*

W. R. Oglebay and J. L. Oglebay, for appellant.

G. H. Gifford, J. R. Coleman, Walter Carter and G. J. Gifford, for appellee.

ROBINSON, C. J.—Suit by appellee to recover the price of goods sold. Upon issues formed a trial by jury resulted in a verdict for appellee. Overruling appellant's motion for a new trial is assigned as error.

The first cause for a new trial discussed is the refusal of the court to permit the introduction in evidence of the affidavit of the publisher of a newspaper at Worthington, Ind., that a certain notice attached to the affidavit was published. This notice was to the effect that the business conducted under the firm name of M. Haas at Worthington, Ind., was that day sold to Morris Haas, who was authorized to collect debts and accounts due the old firm. This notice was signed "M. Haas, Tipton, Ind.," and was dated "Worthington, Ind., March 30, 1898." Moses Haas had purchased the store in 1893 and claimed to have sold it in March, 1898. During this time Morris Haas was in charge of the store. The goods for which suit is brought were sold in September and October, 1898, by appellee, who lived in Indianapolis. The publication of this notice in a newspaper at Worthington, Ind., would not, of itself, be any notice to appellee living in Indianapolis that appellant had sold the store. No promise was made at the time of the offer that notice of this publication would be shown material by proper

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connecting evidence. It is not shown, nor attempted to be shown, that the circumstances were such that appellee may have seen or may have had the opportunity for seeing a copy of the notice. The publication of the notice was not, of itself, any notice to appellee.

It is true that when an objection to the introduction of testimony is overruled no grounds of objection will be considered on appeal except those presented to the trial court. But this rule does not apply where testimony is excluded. There may have been no objection interposed, or the court may have excluded it of its own motion, and such action will stand on appeal unless the party appealing can show the ruling was wrong upon any theory. If the ruling can be sustained upon any theory, whether advanced at the time of the ruling or not, it must stand. *Baldwin v. Threlkeld*, 8 Ind. App. 312; *Leach v. Dickerson*, 14 Ind. App. 375; *Abshire v. Williams*, 76 Ind. 97. See *Conden v. Morningstar*, 94 Ind. 150.

It is argued that the verdict is not sustained by sufficient evidence. There is evidence on the material question essential to appellee's recovery, and while it may be conflicting, we can not weigh it to determine where the preponderance lies.

The third reason for a new trial is that the assessment of the amount of recovery is erroneous, being too large. Appellee was entitled to six per cent. interest on the claims from the time they were due to the time of the trial which amounted to \$1.92, and this added to the amount of the two claims is the amount of the verdict.

The complaint, with which was filed a verified bill of particulars, at the end of which bill was a memorandum of interest due on the account, was taken by the jury to the jury room. This was not reversible error. The bill of particulars was a part of the complaint. It is manifest from the verdict returned that appellant was not in any way prejudiced by such action. *Shulse v. McWilliams*, 104 Ind.

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512; *Summers v. Greathouse*, 87 Ind. 205; *Snyder v. Braden*, 58 Ind. 143. See *Smith v. Thurston*, 8 Ind. App. 105.

The court gave to the jury one instruction. Appellant tendered no instructions. The instruction given is applicable to the evidence and is a correct statement of the law so far as it purports to go. If appellant thought the instruction not sufficiently specific his remedy was to ask further instructions. *Cincinnati, etc., R. Co. v. Smock*, 133 Ind. 411; *Du Souchet v. Dutcher*, 113 Ind. 249; *Tracey v. Hackett*, 19 Ind. App. 133. Taking the instruction given as a whole we do not think any juror of average intelligence could fail to understand that he was required to be guided by the evidence. *City of Indianapolis v. Scott*, 72 Ind. 196; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409; *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614.

Appellee was permitted to show the terms of an agreement as to the purchase and sale of goods between appellant and appellee made about the time appellant purchased the store. This evidence might have some bearing upon whether appellant and Morris Haas were partners, or were employer and employe. But, even if it be admitted that the evidence was not material, appellant has not shown how he was or could have been in any way harmed by its introduction.

From the whole record we can but conclude that no prejudicial error was committed against appellant, and that the motion for a new trial was properly overruled. It appears "that the merits of the cause have been fairly tried and determined in the court below." §670 Burns 1894.

Judgment affirmed.

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SHELBY, ADM., ET AL. v. BOHN.

[No. 8,162. Filed June 8, 1900. Rehearing denied Nov. 18, 1900.]

BONDS. — Guaranty. — Liquidated Damages. — Action. — Parties. —

Where defendants, by a separate instrument, guaranteed the performance of a contract entered into by a gas company to supply plaintiff with gas, binding themselves to pay plaintiff a certain sum as liquidated damages upon a breach of the contract on the part of the company, it is not necessary, in a suit on the bond, to allege the insolvency of the company. *p. 475.*

SAME.—Action.—Decedents' Estates.—An answer in an action on a bond that two of the makers died after the breach thereof, as alleged in the complaint, and that their estates, which were solvent, had been fully administered upon and finally settled, and that plaintiff neglected and failed to file any claims against said estates, asking that the proper share of each of said estates be deducted from any amount found to be due because of the breach of the bond, was insufficient, where it was not shown that such estates were administered upon in this State. *pp. 476, 477.*

SAME.—Action.—Answer.—An answer in an action on a bond given to secure the performance of a contract entered into by a gas company that after the breach of the bond the company was placed in the hands of a receiver, who sold all its property and paid the claims of the company in full and had ample funds in his hands to pay plaintiff's claim, but plaintiff refused to present or file his claim with the receiver, is insufficient, since plaintiff's right of action was complete upon the breach of the contract, and it is not shown that the company was solvent at such time. *pp. 477, 478.*

From the Wayne Circuit Court. *Affirmed.*

T. J. Study, R. A. Black, Henry Warrum, I. P. Poulson, W. F. McBane, E. Marsh and W. W. Cook, for appellants.

J. L. Rupe, Charles Downing and W. A. Hough, for appellee.

HENLEY, J.—On the 7th day of July, 1890, appellee and the People's Gas Company, a corporation organized under the laws of the State of Indiana and doing business at Greenfield, Indiana, entered into a contract, in which contract it was agreed that appellee should pay said gas company \$100, and said gas company agreed to furnish con-

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tinuously to appellee natural gas for fuel and light at a certain dwelling-house in the city of Greenfield. At the same time, the persons who composed the board of directors and officers of said gas company executed and delivered to appellee the following instrument in writing: "Know all men by these presents, That we, Noble Warrum, Hollis B. Thayer, Lee C. Thayer, Israel P. Poulson, Richard A. Black and James A. New are held and firmly bound unto Philip J. Bohn, in the penal sum of one hundred (\$100) dollars, upon condition following: Whereas, the People's Gas Co. of Greenfield, Indiana, have undertaken to furnish natural gas continuously for the sum of \$100 to Philip J. Bohn, under a certain written contract executed contemporaneously with this bond, which is to be construed together with this instrument. Now in case said People's Gas Company shall faithfully comply with all the stipulations in said contract contained, then this obligation shall be null and void, otherwise to be and remain in full force and effect. Witness our hands and seals this 7th day of July, 1890. H. B. Thayer (seal), I. P. Poulson (seal), Lee C. Thayer (seal), R. A. Black (seal), Jas. A. New (seal), Noble Warrum (seal), William New (seal)."

It is averred in appellee's complaint that he has fully performed all and singular the duties imposed upon him by his contract with the People's Gas Company; that the People's Gas Company has failed to furnish him gas and has wholly failed to comply with the terms of the contract upon its part; that by reason of the violation of the contract upon the part of the People's Gas Company, appellants have become liable upon the bond executed to appellee. The contract between appellee and the People's Gas Company, and the bond executed by appellants to insure its performance upon the part of the gas company, are made part of the complaint. It is shown by the averments of the complaint that two of the bondsmen, James A. and William New, died before the commencement of the action. Judgment is de-

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manded in the sum of \$100. After the action was commenced, the death of Noble Warrum being suggested, the court permitted his administrator to be substituted as a defendant. The venue of the cause was changed from Hancock to Wayne county. Appellants filed an answer in seven paragraphs. Appellee demurred to the fifth, sixth, and seventh paragraphs of answer, which demurrer the lower court sustained to each of said paragraphs of answer. Appellants then withdrew their first, second, third, and fourth paragraphs of answer and declined to plead further. Judgment was rendered for appellee in the sum of \$100.

By appellants' assignment of errors in this court, the sufficiency of the complaint and the action of the lower court in sustaining the demurrer of appellee to the fifth, sixth, and seventh paragraphs of answer are questioned. Counsel for appellants argue that the complaint is insufficient for two reasons: (1) Because there is a defect of parties, and (2) because the complaint fails to aver the insolvency of the principal in the contract for the performance of which the bond in suit was executed. As to the first objection, it is sufficient to say that the record does not present the question. It is conceded by both parties to this cause that appellants are bound as guarantors on the bond sued on. The People's Gas Company did not sign the bond and in no way was a party to it. The bond was the separate agreement of appellee and appellants. We are unable to see how the solvency or insolvency of the People's Gas Company could affect the liability of appellants. Appellants in a separate instrument agreed with appellee that if the People's Gas Company failed to perform the obligations imposed upon it by a certain contract with appellee they would respond in damages to appellee in the amount of \$100. Appellants did not agree to become liable with the People's Gas Company upon the contract with appellee. Their agreement was that the People's Gas Company should perform its contract, and upon default the damages to be assessed

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against them were liquidated damages, the amount being named in the bond. The case of *Sample v. Martin*, 46 Ind. 226, is very much like this case. In the case last cited, the Supreme Court say: "The complaint alleges, in substance, that on the 4th day of February, 1870, one Dennis Smith executed to the plaintiff a promissory note for the sum of \$525, payable six months thereafter, and that the defendants, Sample and Hardy, in consideration that the plaintiff would lend said Smith the sum of money specified in the note at the time of the execution thereof, made their written guaranty thereon in these words, viz., 'We guarantee payment. (Signed) James G. Hardy, H. T. Sample.' " The complaint in said case further alleged that Smith wholly failed to pay said note when it became due; that it remains due and unpaid; that payment of said note was demanded of said Hardy and Sample and payment refused. Judgment for the amount is demanded against Hardy and Sample. The complaint was held good. Various answers were filed; the cause went to trial, resulting in a verdict and judgment against Hardy and Sample, the guarantors. The Supreme Court, in disposing of the question of the sufficiency of the evidence, say on page 228: "We are asked to reverse the judgment upon the evidence, upon the ground that the plaintiff failed to sue Smith when he was solvent and able to pay, afterwards becoming insolvent, whereby the defendants, it is claimed, ought to be discharged. The defendants are neither sureties nor indorsers, but guarantors. They are not discharged by a failure to use diligence to collect the note from the maker, nor could they require the plaintiff by notice to sue the maker, as is provided by statute in case of sureties." So that whether we regard the instrument sued on as a guaranty or as an unconditional promise to pay, the averment of the insolvency of the People's Gas Company was immaterial. *Burnham v. Gallentine*, 11 Ind. 295; *Ward v. Wilson*, 100 Ind. 52.

The other questions presented by the record involve the

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sufficiency of the fifth, sixth, and seventh paragraphs of answer to the complaint. The fifth paragraph of answer, omitting the formal parts, is as follows: "For a fifth and further paragraph of partial answer to plaintiff's complaint, the defendants say that long since the alleged breach of the bond as mentioned in plaintiff's complaint, that two of the makers of said bond, to wit, James A. New and William New, had departed this life and that their estates, which were solvent, have been fully administered upon and finally settled; that the plaintiff neglected, failed and refused to file any claim against either of said estates for the breach of said bond mentioned in plaintiff's complaint. Wherefore the defendants ask that the proper share of each of said decedents be deducted from any amount that might be found due the plaintiff for any breach of said bond." This paragraph of answer is fatally defective because it does not show where the estates alleged to have been left by William New and James A. New were situated, and it does not show that either of said decedents ever lived in this State, or could have been sued in its courts, nor does it show that either of said estates was ever administered upon in this State. In the case of *Whittlesey v. Heberer*, 48 Ind. 260, the Supreme Court said: "It appears from the answer that Bippus left an estate sufficient for the payment of all his debts. But it does not appear where he died, or where that estate is situate. It may be presumed, when the contract is sued upon in this State, that it was made in this State, the contrary not appearing. But there is no presumption arising from the fact that a man is dead, that he died in this State. It does not appear that Bippus ever lived in the State, and there is no presumption that he died here, nor is there any presumption that his estate or any part of it is situate here."

The sixth paragraph of answer avers that since the breach of the bond sued upon, upon the proper petition of the stockholders, the People's Gas Company was, by order of the

Hancock Circuit Court, placed in the hands of a receiver, who sold all its property, rights, and franchises and the proceeds derived from such sale, paid all claims against said company in full, and there was left in the hands of the receiver after such payment a large amount of money belonging to said company, and that if appellee had filed his claim with said receiver, he had ample funds in his hands sufficient to have paid the claim in full, but that appellee refused to present or file his claim with said receiver. We think this answer also fatally defective. It shows upon its face that appellee was entitled to an action upon the bond before the company went into the hands of the receiver; that the breach of the bond occurred prior to the time the receiver was asked for or appointed. Appellee was not required to sue the People's Gas Company or to file a claim against it after it had gone into the hands of a receiver. When a breach of his contract with the company occurred, his right of action against the appellants was complete. *Sample v. Martin*, 46 Ind. 226, Baylies on Sur. & Guar., sec. 3, p. 134; *Burnham v. Gallentine*, 11 Ind. 295. Nor is there any sufficient averment in this paragraph of answer that the People's Gas Company was solvent at the time of or since the breach of the bond complained of, or that it has since become insolvent. *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308.

The seventh paragraph of answer proceeds upon the theory that the appellee himself committed acts which resulted in the wrecking of the People's Gas Company, and that his loss was through his own wrongful conduct. It is sufficient to say in regard to this paragraph of answer, that every act charged against appellee he had a perfect right, under the law and under his contract, to do. He was not bound by his contract with the People's Gas Company to refrain from voting at the election of directors, nor was he bound to vote for the appellants or any other named persons for directors and officers of said gas company, and there

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is no averment in the answer that appellee exercised any control in the management of the affairs of said company. It is not averred that he was a director, and if he had been a director, his vote alone could not have influenced the affairs of said company, because it requires a majority of the board of directors of incorporated companies to act for the company. There is no averment in this paragraph of answer that the appellee controlled the board of directors, either by undue influence or in any other way. The seventh paragraph of answer is wholly insufficient.

We find no error in the record. Judgment affirmed.

Black, J., took no part in the consideration or decision of this case.

GOOD ROADS MACHINERY COMPANY v. MOORE ET AL.

[No. 8,159. Filed November 14, 1900.]

ALTERATION OF INSTRUMENTS.—Bonds.—Contracts.—Principal and Surety.—Release of Surety.—In an action on a bond given to secure the performance of a contract entered into by an agent for the sale of goods, it was shown that the contract authorized the agent to sell goods "in the State of Indiana and," with a blank of two and a half lines in the printed form of contract after the word "and," but the contract was otherwise complete upon its face; that after the execution of the bond by defendants, on the back of the contract, and without their knowledge or consent, plaintiff filled in the blank space, giving the agent additional territory in the state of Illinois. *Held*, that the alteration was material and unauthorized, and released the sureties on the bond.

From the Kosciusko Circuit Court. *Affirmed*.

D. H. Bowles, W. A. Bastian and W. W. Thornton, for appellant.

L. W. Royse, Bertram Shane, J. W. Cook, A. G. Wood, and F. E. Bowser, for appellees.

HENLEY, J.—The material averments of appellant's first paragraph of complaint are that by written contract dated February 8, 1897, it appointed appellee Moore its agent for the sale of road machinery in Indiana and a part of Illinois;

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that appellees Hoover, Stinson, and Foster became the sureties for said Moore by signing a bond indorsed on the back of said contract, conditioned for the faithful performance by said Moore of the obligations imposed upon him by the contract with appellant; that Moore failed to remit and account for the proceeds of the sales made by him under the contract with appellant. Judgment for the amount so withheld is demanded against Moore and his sureties. Copies of the contract and bond and a bill of particulars showing the amount claimed are filed with and made a part of the complaint.

It is averred in the second paragraph of the complaint that by written contract of date above mentioned, the appellant appointed said Moore as its agent for Indiana; that appellees Hoover, Stinson, and Foster became sureties as aforesaid, but that long prior to said date said Moore had desired to represent appellant in the state of Illinois, as well as in Indiana, and had been negotiating with appellant on that subject; but that appellant at that time had promised a part of Illinois to other agents and could not tell what part of Illinois he would be able to assign to said Moore; that appellant prepared and sent to said Moore a contract in which was printed the following clause: "In and for the following named territory, viz., the State of Indiana and _____;" that a blank was left after the word "and" of two and one-half lines of said printed form; that appellant told said Moore that as soon as it learned what part of Illinois it could assign him, a description of the part assigned would be inserted in the contract where the blank lines were left after the word "and"; that the contract in such condition with the bond, indorsed on its back, was signed by said Moore, and the bond was signed by his sureties and was so delivered to appellant; that thereafter, appellant having ascertained what part of Illinois it could assign said Moore, filled in at the request of said Moore and after the word "and" in said contract the following words:

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"Illinois north of and not included in the counties of Adams, Pike, Scott, Morgan, Macoupin, Montgomery, Shelby, Coles, and Edgar."

It is averred that exhibit A filed with the complaint is a copy of the contract with the blank filled up as heretofore set out. The failure to comply with the terms of the contract in remitting money to the appellant is averred, and the same relief prayed for as in the first paragraph. Appellees Hoover, Stinson, and Foster separately demurred to the second paragraph of the complaint. The court held the second paragraph of the complaint insufficient as against a demurrer for want of facts. Appellees Hoover and Stinson answered jointly, and appellee Foster severally. These answers were in five paragraphs, a general denial and four special paragraphs. The averments of the answers were identical. Appellant's demurrer for want of facts to the last four paragraphs of each answer was overruled. Error is assigned only in the overruling of appellant's demurrer to the fourth paragraph. In the fourth paragraph of the answer of Hoover and Stinson, and in the fourth paragraph of the separate answer of Foster, it is averred that after the bond had been signed and delivered, the appellant, without the knowledge or consent of said appellees, altered and changed the contract between itself and said Moore by writing in and adding after the word Indiana that part of the state of Illinois which the contract contains. To these four paragraphs of answer appellant filed three paragraphs of reply, to the second and third of which demurrers for want of facts were sustained. The first paragraph was a general denial; the second paragraph avers that after the contract was made Moore applied for permission to sell in said part of Illinois in addition to Indiana, and that appellant gave such permission and consented thereto in writing, by inserting in the contract after the words "in the State of Indiana and" the words "Illinois north of" etc., and that such insertion was made for the purpose of giving and evidencing in writing its

consent that Moore might sell outside of the territory originally allotted.

The third paragraph of reply in its averments is very similar to the second paragraph of the complaint, averring the fact of appellant's inability at the time the contract was made to determine what part of Illinois it would be able to assign to Moore, and that it being the mutual desire of said appellant and said Moore to go to work without delay, the contract was executed to cover the State of Indiana, and the blank left for the purpose of inserting therein whatever part of Illinois it might be able to assign him, and that the subsequent filling in of the blank at the request of said Moore was for the sole purpose of complying with the original negotiations.

The cause was submitted to the court for trial. There was a finding and judgment in appellant's favor against appellee Moore, and a finding and judgment in favor of the appellees Hoover, Stinson, and Foster. The questions presented by the rulings on the pleadings are, we think, properly resolved into the following: (1) Under the terms of the contract, was the alteration a material one? (2) Was the alteration made by appellant such an alteration as appellant was, under the form and terms of the contract, authorized to make without the knowledge or consent of the sureties?

That a material alteration of the terms of a contract without the consent of the surety will release the surety is a proposition of law too well settled to need the citation of authorities to sustain it. Equally well settled is the rule in this State that the contract of a surety is *strictissimi juris*. By the terms of the contract Moore was restricted in his sales to the territory named therein. The words used in the contract restricting him to "said territory" must mean the territory named. He was not given the exclusive right to the territory named with the power to go beyond, but was given the exclusive right to the territory named and restricted to "said territory." If other territory was added, the presumption is that the sales under the changed contract

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would be increased in proportion as the territory was enlarged, and as the sales increased so would the liability of the sureties increase. Counsel for appellant have failed to cite us to any authority or to give in their able brief any reason why such a change as the one made in the contract under consideration is not a material change.

We come then to the next question, which involves the right of appellant to enlarge the scope of the contract by filling in words at the blank lines descriptive of other territory than that described at the time the contract was signed and the bond executed.

The contract described the territory as "The State of Indiana and ——," the blank space following the word "and" covering three lines of the printed contract. The sureties signing the bond are chargeable with notice of the existence of the blank lines at the time they signed the bond. They must know that appellant would have the right to fill up any blank necessary to make the contract a complete and enforceable one, but they, the sureties, also knew that the appellant could not add to or take from a contract already complete in its terms at the time it was signed by them, no matter how many blanks might be left unfilled. In this case the blank left for the description of the territory was filled by inserting the words "The State of Indiana and ——." Room was left on the blank lines of the contract after writing in these words, upon which the appellant could have described a continent, but the contract itself expressly provides that "this agreement contains the full understanding and is not to be affected by any verbal statement whatever." If it contained the full understanding the sureties certainly had a right to expect their liability to be measured by its terms as they existed at the time of signing. We think the true rule is laid down in the case of *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, where it is said: "There seems to be a manifest distinction between the addition of new words, or the erasure of words and substitution of others, changing the liability

in an instrument perfect when signed, and the insertion of words to fill up blanks which the party signing knew must be filled up to make the bond or contract perfect in form or substance. In the one case it is in effect making a new contract; in the other it is but finishing and making perfect the contract agreed upon." In this case there is no question affecting the rights of innocent third parties, but in none of the decided cases do we find that a contract of any kind complete upon its face can be changed simply because spaces were left in it in such a manner as to permit its being changed. Thus in the case of *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, it is said: "The indorser of a promissory note which is complete on its face, the sum payable, the date, the time of payment and name of payee, all being inserted, who delivers it to the maker, who is neither his agent nor his employe, to be carried to the payee, is not liable to a *bona fide* holder for value for the increased amount of the note if the maker raises it before delivering it, simply because spaces were left in the note in such a manner as to permit words and figures to be inserted, and thus increase the amount payable and readily deceive innocent third parties." These cases are not contrary to the decisions of our own courts. It is held in the case of *Geddes v. Blackmore*, 132 Ind. 551, that where one signs his name to a piece of blank paper intending that it should be filled up as a note, or indorsement, he is liable on the same, although the person to whom it was intrusted violated the confidence reposed in him by filling it up with another sum or using it for another purpose than the one intended. *Wilson v. Kinsey*, 49 Ind. 35; *Cornell v. Nebeker*, 58 Ind. 425. Also see, *Roberts v. Adams*, 8 Porter (Ala.) 297.

We must hold in the case at bar that the addition of more territory to the contract between appellant and Moore was a material and unauthorized change of the contract as it existed at the time the sureties executed the bond. This was the view taken by the lower court. We find no error.

Judgment affirmed.

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SPAULDING ET AL. v. BAXTER ET AL.

[No. 3,184. Filed November 15, 1900.]

MUNICIPAL CORPORATIONS. — Sewers. — Construction. — Declaratory Resolution.—A resolution declaring the “desirability of, and ordering the construction of a sewer,” is a substantial compliance with the statute as to the declaration of necessity, since by ordering the improvement made the council necessarily determines the necessity thereof. *p. 486.*

SAME. — Sewers. — Assessments. — Complaint.—A complaint to enforce a sewer assessment lien is not bad as failing to show that the contract for the improvement was let to the best bidder, where it is averred that notice was published calling for bids, and afterwards the bid of a person named was accepted. *p. 486.*

SAME. — Sewers. — Resolution. — Notice.—An assessment made for the construction of a sewer is not invalid because of the failure of the council to adopt a resolution of necessity and give notice thereof as provided by §4289 Burns 1894, where notice was given for hearing objections to the final estimates as provided by §4294 Burns 1894. *pp. 486-488.*

SAME. — Sewers. — Assessments.—A resolution for the construction of a sewer provided that the entire cost thereof should be paid from the general fund of the city, and the clerk was ordered to advertise for bids, conditioned that the contractor should accept the obligation of the city in payment for the work. After the completion of the work it was ascertained that the city was indebted beyond the constitutional limit, and to relieve the city from the debt, and give the contractor better security, the city made a new and different estimate, and assessed the cost thereof to the property owners. *Held*, that the assessments were invalid. *pp. 488-493.*

SAME. — Sewers. — Assessments. — Estoppel.—Where a sewer was constructed under a resolution providing that the cost thereof should be paid from the general fund of the city, a property owner who was benefited by the improvement and stood by and permitted the work to proceed without objection is not thereby estopped from contesting the validity of an assessment against his property made after the work was completed, accepted, and paid for in the manner provided for in the resolution and contract. *p. 491.*

From the Blackford Circuit Court. *Reversed.*

J. A. Hindman, for appellants.

J. S. Dailey, Abram Simmons, F. C. Dailey and C. W. Kinnan, for appellees.

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ROBINSON, C. J.—Complaint in four paragraphs by appellee Baxter, as assignee of the contractor, to collect a sewer assessment. Demurrer overruled. Answer in denial and second paragraph of special answer. Demurrer to second paragraph sustained. General denial withdrawn and judgment on the pleadings. Errors are assigned upon the rulings on the demurrer to the complaint and answer.

Objection is made to the complaint that it fails to show the council ever adopted any resolution declaring the necessity for the sewer; that it is not shown the contract was let to the best bidder; and that it is not shown any notice was given of the adoption of the resolution for the construction of the sewer. The complaint avers that the council passed and adopted a resolution “declaring the desirability of, and ordering the construction of, a sewer along ” (giving the route). The language used in the pleading is sufficient as to the statutory requirements of a declaratory resolution. Declaring the desirability of an improvement substantially complies with the statute. Besides, the council has the exclusive right to judge of the necessity for the improvement, and when it acts, and orders the improvement made, such action necessarily involves a determination of the necessity for the work. See *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261.

As to the second objection, it is averred that notice was published calling for bids, and afterwards the bid of a person named was accepted. The council has the right to choose between bidders, and in exercising that right we must presume that it “acted in good faith and for the best interests of both the city and the property holders, and exercised its discretionary powers wisely.” *Boyd v. Murphy*, 127 Ind. 174.

The complaint does not show that any notice of a resolution of necessity was given. The pleading avers that, after the adoption of the resolution declaring the desirability of a sewer, specifications were adopted and the city clerk or-

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dered to advertise for bids, which was done; that the contract was let, the work done, sewer accepted, report of final estimate by city engineer, and notice given to hear and consider objections to this report. §4289 Burns 1894 provides: "Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, * * * * * the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof." §4290 Burns 1894 provides for apportioning the cost of the improvement. §4292 gives the common council power to order and make the improvement by a two-thirds vote without any petition. §4293 provides for making the final estimate of the cost of the improvement. §4294 provides for notice and hearing of objections to final estimates. §4296 provides for issuing bonds and makes them a lien on the property assessed.

It has been decided that the resolution of necessity and the resolution ordering the work may be adopted by the council as one resolution. *Barber, etc., Co. v. Edgerton*, 125 Ind. 455. The statute above set out requires that notice of the resolution of necessity shall be given, but it has been held that "As to whether a particular improvement is, or is not, necessary must, of necessity, be left to the discretion of the common council of the city where the improvement is to be made. This question, we think, under the statutes in force in this State, may be determined by such council

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without notice to the property owner who is to be affected by such improvement." *Barber, etc., Co. v. Edgerton, supra*; *Garvin v. Daussman*, 114 Ind. 429; *Bozarth v. McGillicuddy*, 19 Ind. App. 26; *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261; *Hughes v. Parker*, 148 Ind. 692; *Lewis v. Albertson*, 23 Ind. App. 147.

In *Hughes v. Parker, supra*, in answer to the argument that the council never acquired jurisdiction of the subject-matter of the improvement, or of the persons of the property owners assessed therefor, for the reason that no resolution was ever passed, or notice thereof given, as required by §4289 Burns 1894, the court said: "It must be admitted that the proceedings of the council in this matter were irregular. The resolution of necessity should have been adopted and notice thereof given as provided in the statute. But it has been repeatedly held that such resolution and notice are not essential to give jurisdiction to the council, provided only that notice and a hearing are given to the property owners before the making of the final assessments." The complaint shows that notice was given for hearing objections to the final estimates as provided in §4294 Burns 1894, and under the above rulings this was sufficient, without any resolution of necessity and notice thereof. The demurrer to the complaint was properly overruled.

The second paragraph of answer alleges that on August 18, 1896, the common council by resolution ordered the construction of the sewer; that the resolution contained among others the following provision: "And it is further ordered and ordained that in the opinion of the common council of said city it is desirable to pay, and the same is hereby ordered to be paid, the entire cost of building, constructing, and laying the above described sewer, out of the general funds of said city, and the city clerk is hereby ordered to advertise for bids for three consecutive weeks in the Evening Herald of said city for sealed proposals for the construction of said sewer;" that the clerk duly adver-

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tised for bids; that no other order, resolution, or advertisement for bids was made or published; that it was provided in the order, resolution, and advertisement for bids, that all bids should be submitted on blanks furnished by the city and required each bidder to propose to accept the obligations of the city in payment for the work; that one Miller submitted a bid and proposed to accept the obligations of the city for the work, and a contract was entered into in which Miller agreed to accept city bonds for the work; that as the work progressed estimates were made, bonds issued, and accepted by Miller; that on September 7, 1897, the civil engineer reported the completion of the work, which report was adopted and the work accepted; that no notice whatever was given of the passing of the resolution for the construction of the sewer and ordering the work to be done, and relying upon the belief that the work was being done wholly at the cost and expense of the city and that the same would be paid out of the general funds of the city as provided for in the resolution, ordinance, and contract, appellants offered no objection thereto, and allowed the same to proceed to completion, without objection, because of such information and belief; that when the resolution was passed, bids advertised for, and the contract let, the debts of the city exceeded *two per centum* of the taxable property; that city orders were selling at a discount of twenty to sixty per cent. which was generally known; that by reason of such excessive indebtedness contractors refused to submit competitive bids for the work, and by reason of the doubt and hazard in collecting pay for the work the contract was let at a price greatly in excess of the value thereof, to wit, \$8,000; that had it been known at the time of letting the contract that the cost would be assessed against the property, a contract would have been made for building the sewer as it was built for \$9,000; that after the work was completed, accepted, and paid for in the manner provided in the resolution, ordinance, and contract, the city council, on October 12, 1897,

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for the purpose of relieving the city from the debt, and to give the contractor better security, pretended to adopt a new and different estimate of the cost of constructing the sewer, and wrongfully and without right assessed the cost of the sewer partly against the property abutting on the sewer, and the remainder against property pretended to be benefited thereby, and upon this pretended assessment this suit is brought; that there never was any resolution or ordinance adopted by the council for the construction of the sewer to be paid for by such assessment; that there was no advertisement for bids, nor was any bid submitted, nor any contract made for the construction of the sewer to be paid for in any other manner than by the city out of the general fund. The demurrer to the answer, in so far as any question is presented for review, admits that the facts pleaded are true. Whether the proof will sustain these allegations is not a matter proper for discussion in arguments and briefs, nor is it a matter with which we have anything to do.

Section 4292 Burns 1894 authorizes a city council, if deemed just and right by it, to pay any part or all of the expenses of an improvement like that in question out of the general revenue of the city. Whether such expenses should be so paid would be within the discretion of the council, just as it is within the council's discretion whether or not the improvement shall be made at all. The theory of the statute is that property along the line of the improvement will be especially benefited, and should pay the expenses, and a resolution ordering that an improvement be made and saying nothing about the manner of deriving the funds to pay the expenses would mean that the expense was to be assessed on the property along the improvement. But the above section is in the nature of an exception, and if the council in the exercise of a sound discretion deem it just and right it may order the expenses paid as therein provided. In the case at bar, for some reason deemed by the council sufficient, it made the choice and proceeded in the matter until the

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work was completed upon the expressed purpose that the expense was to be paid out of the general fund. It is no doubt true that if appellants had knowledge of a resolution ordering an improvement, and the resolution said nothing about the manner of payment, they would be held to know that their property was liable to be assessed. But this would not necessarily be true where the resolution expressly provides that the expense is to be paid from the general fund.

Upon the facts as pleaded the doctrine of estoppel does not apply as to the appellants. It is true they saw the work progressing, and made no objection, but the council had said by a resolution that the expense was to be paid out of the general fund. The question of a special assessment against appellants' property was not presented during the progress of the work. Appellants may or may not have known of the city's indebtedness, but this fact was known to the contractor when the contract was made. It is a familiar rule that a person contracting with a municipality must at his peril inquire into the power of the municipality or of its officers to make the contract. *Dillon Munic. Corp.* (4th ed.) §447; *Clements v. Lee*, 114 Ind. 397; *Board, etc., v. Galloway*, 17 Ind. App. 689; *Johnson v. Common Council, etc.*, 16 Ind. 227; *Woodruff v. Board, etc.*, 10 Ind. App. 179; *State, ex rel., v. Common Council, etc.*, 138 Ind. 455; *Board, etc., v. Fertich*, 18 Ind. App. 1; *Board, etc., v. Allman*, 142 Ind. 573; *Bridge Co. v. Board, etc.*, 19 Ind. App. 672.

Appellants knew the improvement was going on, and it became their duty as property owners to inform themselves as to the authority by which the council was making the improvements. *City of Elkhart v. Wickwire*, 121 Ind. 331. But when they did seek information from the public records of the council up to and including the completion and acceptance of the work, they were informed that the cost was to be paid out of the general fund of the city, and that it was not to be paid for by special assessments. Under the pro-

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visions of the statute it can not be said that it could make no difference to appellants whether they paid their portion through general taxation or special assessment. A property owner might be willing to pay his portion of a general tax to be levied to pay for an improvement, and knowing the improvement was being made he could have no reason to believe he would be specially assessed.

If the city entered into a contract which it had no power to make, it does not necessarily follow, simply because the work has been done, that after the work is done a material part of the contract may be changed so that it may be made effective. The contractor accepted and acted upon the method originally adopted. The fact that a property owner acquiesced in that particular method by his silence does not warrant the contractor in saying that he did the work on the faith of receiving pay from the property owner. The work was done with knowledge of the fact that it was to be paid from the general fund of the city. The contractor must know whether the city could make such a contract.

If in fact the work had been completed, accepted and paid for in the manner provided in the resolution, ordinance and contract, the city had no power then to make a new estimate of the cost and assess the cost and expense against property owners along the line of the work. The city in the first instance could adopt either of the two methods, but after it had adopted one and carried the work to completion it could not then adopt the other as supplemental to the first. Whether the contract entered into by the city was void because of the city's indebtedness, we need not and do not decide. Conceding that the council had the power to make the improvement and provide for paying the cost, when it had completely exercised this special power the power was exhausted. The council's right to act was by virtue of statutory authority only, and this authority terminated when the work was completed, accepted, and paid for as provided in the resolution and contract. The answer

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shows that after the engineer reported the completion of the work and it was accepted and paid for as provided in the resolution and contract, the council made a new and different estimate of the cost and assessed the same against property owners. That a valid assessment might be made against appellants, at least color of jurisdiction must be shown, but it is evident there was no jurisdiction of appellants acquired.

In *Doctor v. Hartman*, 74 Ind. 221, it was held that a board of commissioners could not set aside an order accepting the report of viewers in a highway proceeding and dismiss the petition. In *Board, etc., v. State*, 61 Ind. 75, the right of the board to set aside an order locating a county seat was denied. In *City of Indianapolis v. Patterson*, 33 Ind. 157, after an estimate had been made, approved by the council, and ordered paid, the council rescinded its order approving this estimate, and adopted and approved another for a less sum. The court was equally divided upon the question whether the power of the council over the estimate was exhausted when it had first approved it and directed its payment. See, also, *City of Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395; *Connecticut, etc., Ins. Co. v. City of Chicago*, 185 Ill. 148, 56 N. E. 1071; *Alford v. City of Dallas* (Tex. Civ. App.), 35 S. W. 816; *City of Covington v. Ludlow*, 1 Metc. (Ky.) 295; *City of Madison v. Smith*, 83 Ind. 502; *Gavin v. Board, etc.*, 104 Ind. 201.

We are not prepared to assent to a relaxation of the rule requiring strict compliance with statutory requirements by a municipality, to the extent shown in this answer. A city may make improvements and provide for paying for the work, not by virtue of any inherent authority in the municipality, but because the legislature has said that it may. Not only has the legislature said a city may act in such matters, but it has said how it shall act, and the prescribed statutory method constitutes the measure of its power. It may be true that some of these statutory provisions are

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merely directory, but it must be true that those provisions which are intended to protect the property owner are mandatory. The demurrer to the second paragraph of answer should have been overruled.

Judgment reversed.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD
COMPANY v. GRIMM.

[No. 8,019. Filed May 29, 1900. Rehearing denied Nov. 16, 1900.]

NEGLIGENCE.—*Question of Fact.*—*Railroads.*—The question as to whether a railroad company was guilty of negligence in running a passenger train with the locomotive in the rear was properly submitted to the jury, in an action by a passenger for personal injuries, caused by the train striking a horse on the track. *p. 497.*

SAME.—*Proximate Cause.*—*Railroads.*—The negligence of a railroad company in running a train with the locomotive in the rear was the proximate cause of an injury to plaintiff while a passenger thereon, caused by the train striking a horse on the track. *pp. 497, 498.*

SPECIAL FINDING.—*Verdict.*—*Evidence.*—*Railroads.*—*Personal Injuries.*—A special finding in an action against a railroad company for damages for personal injuries to plaintiff while a passenger on defendant's train, caused by the train striking a horse on the track, to the effect that the train was running at a speed of twelve miles an hour, over a safe track, well fenced, with good cattle-guards at crossings, safe cars and locomotive, in charge of competent men, when the horse suddenly sprang upon the track, fifteen or twenty feet in front of the train, and it was impossible to stop the train and avoid a collision, is not in irreconcilable conflict with a general verdict for plaintiff, where the evidence showed that the train was being run backward, with a light caboose on the front, and that a train run in such manner was easily derailed by coming in contact with an obstruction on the track. *pp. 498-500.*

CARRIERS.—*Injury of Passenger.*—*Negligence.*—Where a passenger is injured by the derailment of a train he is only required to show that he was injured without fault on his part, the law then presumes negligence upon the part of the carrier, and it devolves upon the carrier to remove such presumption. *p. 500.*

EVIDENCE.—*Expert Testimony.*—*Railroads.*—The testimony of an experienced railroad man as to the danger in running a train backward is admissible in the trial of an action for personal injuries received by a passenger who was injured while riding on a train run with the engine in the rear. *pp. 501, 502.*

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EVIDENCE.—*Rebuttal.—Damages.—Railroads.*—Where, in the trial of an action against a railroad company for injuries received by a passenger caused by a collision of the train with a horse on the track, the defendant introduced evidence to the effect that the road was fenced, and stock was prohibited from running at large, it was proper for plaintiff to prove in rebuttal that stock was frequently seen on the road. *pp. 504, 505.*

CARRIERS.—*Personal Injury of Passenger.—Negligence.—Instructions.*—An instruction in the trial of an action against a railroad company for personal injuries to a passenger that when a carrier receives a passenger on its train it undertakes to carry him safely to his destination was not misleading when considered with another instruction that the greatest possible care to be exercised by a railroad company for the safety of its passengers is not to be understood as requiring the utmost degree of care which the mind can attain to or is capable of inventing, but simply means the greatest degree of care that is consistent with the particular mode of transportation. *pp. 505-508.*

From the Clay Circuit Court. *Affirmed.*

G. A. Knight, for appellant.

S. D. Coffey, for appellee.

COMSTOCK, J.—The complaint in this cause was in two paragraphs. The first paragraph, omitting its formal parts, avers that on the 19th day of November, 1897, and for a long time prior thereto, the defendant had been in the business of a common carrier in carrying and transporting passengers for hire over its railroad from the city of Brazil to a coal mine known as the Standard Block Coal Company and to return therefrom to the city of Brazil; that on said day the defendant undertook and agreed with the plaintiff, for a reasonable compensation theretofore paid by him to said defendant, safely to carry and transport the plaintiff from said city of Brazil to the said Standard Block Coal Company mine and return in good and comfortable cars; that, pursuant to said agreement and undertaking, the said plaintiff entered the cars of said defendant at the said city of Brazil, and was safely carried and transported therefrom to the said mine, but the plaintiff alleges that said defendant did not keep its agreement and undertaking safely to

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carry and transport the plaintiff from said mine back to the said city of Brazil in good comfortable cars, but failed therein in this, to wit: that the plaintiff entered the cars of said defendant at said mine known as Standard Block Coal Company, for the purpose of being carried and transported from said mine to the city of Brazil, where he resided, which car was in a train consisting of eight cars; that, instead of hitching the engine, by which said cars and train were to be moved, to the front of said train so that the engineer might and could see and observe any obstructions on the railroad track of defendant, and check said train in time to prevent and avoid a collision with such obstruction, it negligently and carelessly attached said engine to the rear of said train, and carelessly and negligently run said train backwards at a rapid rate of speed, to wit, nearly twenty miles per hour; that while so running said train backwards, the engineer in charge of said engine was unable to see and observe obstructions on said track in time to avoid collision therewith, and by reason of the fact that the cars were not preceded by an engine they were liable to be derailed upon coming in contact with any obstruction on said track; that while thus negligently and carelessly running said train backwards at a speed of nearly twenty miles per hour, the same came in contact with a horse on said track, by reason of which the cars ahead of him were derailed and thrown from the track, causing the other cars to jam together with great force and violence, thereby throwing plaintiff from his seat with great force against some object in said car, striking him in the small of the back and side, whereby he received the injuries complained of. The acts of negligence charged in the second paragraph are substantially the same as those set out in the first. A demurrer was overruled to each paragraph; the cause put at issue by general denial. A trial resulted in a general verdict in favor of appellee for \$1,488. With the general verdict answers to interrogatories were returned.

The errors assigned are: (1) The overruling of appel-

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lant's demurrer to each paragraph of the complaint; (2) the overruling of appellant's motion for judgment in its favor on the answers of the jury to interrogatories, notwithstanding the general verdict; (3) overruling appellant's motion for a new trial.

Counsel for appellant contend that the complaint is in tort; for appellee, that it is in contract. Conceding, without deciding, that it is in tort, it will be so treated in this opinion.

It is urged against the complaint (1) that no actionable negligence is charged; (2) that the acts of negligence attempted to be charged are not shown to be the proximate cause of appellee's injury. We would not be warranted in holding as a matter of law that the operating of a train of cars as averred in the complaint was not negligence. It was a question, in our opinion, to be submitted to the jury under proper instructions. As said by the Supreme Court in *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 547: "It is not necessary in such a complaint to recite all the facts and circumstances that may tend to show that the act complained of was negligent. It is settled by the decisions of this court that a complaint charging the defendant with an act injurious to plaintiff, with a general allegation of negligence in the performance of the act, is sufficient to withstand a demurrer to the complaint for want of sufficient facts; and that under such allegation any evidence tending to show that the act was negligently done may be admitted; otherwise the evidence would have to be pleaded instead of the facts." Upon the subject of proximate cause, the Supreme Court in *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 197, said: "It is not necessary that precisely such an accident as actually occurred might be anticipated, for there is liability if it was probable that some injury might result from a negligent breach of duty. We have disposed of the argument of appellant which asserts that the negligence attributed to it was not the proximate cause of appellee's in-

jury in what we have said, for, as the authorities all declare, if the injury resulted from the negligent act of defendant, that act will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. The authorities we have cited declare the doctrine we have stated, as do those which follow, and many others. Bishop Non-Contract Law, §§46, 457; Wharton on Negligence (2nd ed.), §77." The consequences following the running of the train with the locomotive in its rear as averred in the complaint were not so unnatural or unusual that they could not have been foreseen. The objections to the complaint are not well taken.

Counsel for appellant next contend that the court erred in refusing to render judgment in its favor on the answers of the jury to the special interrogatories notwithstanding the general verdict, upon the following grounds: (1) The special findings of fact do not show that the negligence charged in the complaint was the proximate cause of appellee's injury; (2) because they show that appellant exercised the highest degree of practicable care to guard appellee against injury; (3) because the collision with the horse was unavoidable. The special facts found show the train was running at the speed of twelve miles an hour over a safe track and roadbed, with safe cars and locomotive, all properly equipped; that the road was securely fenced, with good cattle-guards at highway crossings, and wing fences thereat; with a competent and careful engineer; with engineer and fireman at their posts looking ahead for signals; with conductor standing on steps at one side on front end of caboose; with a brakeman standing on steps at the other side on front end of caboose; both provided with lanterns to signal engineer in case of danger; a brakeman standing at the brake on platform at front end of caboose; all three of these in a position to see ahead, and all watching for dangers ahead; that it was light enough to see 200 or 300 feet ahead of the train; that a horse suddenly sprang upon the

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track fifteen or twenty feet in front of the caboose, just inside the right of way at highway crossing; that promptly signals were given to engineer, but it was impossible to stop the train and avoid the collision by anything the engineer could have done; the collision occurred with the horse; three cars were derailed; that appellee had frequently ridden on said train and knew how it was run and operated; that the collision with the horse was the cause of the derailment, and that the collision was unavoidable; that the engineer and brakeman used every effort to stop the train after the horse sprang upon the track; that the train was a miners' train composed of box cars; that the collision occurred, not on main line, but on a switch or lateral branch known as Caseyville branch; that said train could not be stopped in time to avoid collision, and that the horse was not observed until he sprang upon the track.

Answers of the jury to interrogatories will overthrow the general verdict only when there is such an antagonism upon the face of the record as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause. *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 218. *Sponhaur v. Malloy*, 21 Ind. App. 287, 300, and authorities there cited.

Every presumption is indulged in favor of the general verdict. It implies that the jury found every fact charged in the complaint to entitle appellee to recover, and that every defense set up to defeat a recovery of the plaintiff was found against the defendant.

Is the special finding of facts irreconcilably in conflict with the general verdict? It is shown by the evidence that cattle and horses were frequently, before the accident, found on the track over which appellant ran its trains, and that the men on more than one occasion stopped the train to drive them off. When appellee was injured, appellant's train was being run backwards at the rate of twelve miles an hour with a light caboose on the front. It was shown by the testimony that a train run in this manner would be derailed in nine

instances out of ten if it came in contact with an obstruction on the track. This evidence removes any apparent conflict in the general verdict and the answers to the interrogatories as to the proximate cause of appellee's injury.

As to the second reason given for judgment on the answers to interrogatories, it is proper to say that the negligence charged is the running of a train backward at a rapid rate of speed, so that the engineer was unable to see an obstruction on the track in time to stop the train and avoid the same, and that the train was liable to be derailed by reason of the light car coming in contact with obstructions. It may be conceded that the collision with the horse was unavoidable, under the circumstances, but that was not sufficient. It only devolves upon a passenger to show that he was injured without fault on his part. The law then presumes negligence upon the part of the carrier, and it is for the carrier to remove this presumption.

In discussing the action of the court in overruling the motion for a new trial, it is claimed by counsel for appellant that the verdict is contrary to the evidence, is not sustained by sufficient evidence, and is contrary to law. The evidence discloses that at the time of the accident the train was made up of a caboose in front of seven box or freight cars in which from 300 to 400 passengers, miners, were riding, and the locomotive was attached with its front end to the rear end of the last car, pushing the train. It was running at the rate of from twelve to twenty miles an hour over a track on which horses had been frequently seen. The engine could have been placed at the front end of the train at the loss of a few minutes' time. In the opinion of experts it was dangerous to run the train in this manner. Derailment was likely to occur if the caboose came in contact with an obstruction. It was the duty of the railroad to use the highest degree of practicable care to prevent injury. *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583. The evidence shows that it failed to do this. It follows that the verdict is sustained by the evidence and is not contrary to law.

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The admission of certain testimony is also made a reason for a new trial. Appellant objected to each of the following questions propounded to John Davis, a witness for appellee: "You may state to the jury what difference there is, if any, as to the safety of running a train backward or forward?" A. Why, there is a difference in running a train forward and backward; that is, with the locomotive in the rear. Q. I'll ask you to state to the jury what effect a heavy engine has, as to the question of its weight, as to its being calculated to destroy any object on the track? A. Why, a heavy engine is more liable to destroy anything by cutting it up and not derailing the engine." The following question was asked said witness: "I'll ask you to state to the jury as an expert at what rate of speed it would be safe for a train carrying passengers to run backward? A. That would be a hard question for me to determine as an expert, as they claim my opinion is. It would not be safe to run a train backwards at all with passengers." Appellant also objected to each of the following questions propounded to W. W. Lathrop, a witness for appellee: "What is there, if anything, as to the weight of the engine affecting the safety of the train?" Answer: "It has. You take the locomotive engines, the standard engines they are using now, and these big engines are much heavier than the standard engines, the weight of them is far superior to the weight of a car. In striking any object it would have a tendency to throw it off the track, where otherwise it would go under." Also the following: "What tendency, if any, would it have to pulverize any object which was struck on the track?" Answer: "It would have more tendency to crush, the greater weight, of course." Also the following: "What would likely be the result of striking a horse, the cars being backed, the engine at the rear end of the train being run backward? What would probably be the result of striking a horse?" Answer: "My opinion would be, nine times out of ten you would knock the horse on the track, and you would run onto it. Derail the cars? Yes." These questions were objected

to and grounds of objection stated at the proper time and exceptions taken. It is insisted that this testimony was inadmissible because it "did not relate to any question of art, science, skill or trade, but was purely speculative and conjectural." In this claim, counsel are in error. Mr. Rogers, in his *Expert Testimony*, p. 236, §104, says: "An experienced railroad man, who has made a business of the running and management of railroads, is as fairly an expert as one skilled in any other art, and he may give testimony as an expert in questions of railroad management. The running and management of railways is so far an art, outside of the experience and knowledge of ordinary persons as to render the opinions of persons skilled therein admissible in evidence." *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18. The witnesses referred to were experienced railroad men. No question was raised as to their qualifications to testify. They testified that it was much more dangerous to run a train of cars in front of an engine than with the engine in front of the cars. They gave their reasons for the opinion expressed. They expressed the opinion that a car coming in contact with a horse, the engine being in the rear of the train, is likely to knock it down on the track, where the cars will run over it, and in most instances result in the derailing of the cars; while if the animal is struck by the engine, it is likely to be thrown from the track, or by reason of the greater weight of the engine to be cut or pulverized so that the cars will pass over it without being derailed. The testimony was competent. *Cooper v. Central Railroad, etc.*, 44 Iowa 134; *Indiana, etc., R. Co. v. Hale*, 93 Ind. 79; *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60; *Louisville, etc., R. Co. v. Donnegan*, 111 Ind. 179. The reasons of the opinions entertained by these witnesses were competent; it was for the jury to determine their weight.

Appellant objected to certain questions propounded upon cross-examination to witnesses for and employes of appellant,—Eldridge, Miller, and O'Dell. The action of the

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court is made as to each witness a reason for a new trial. The appellant objected to each of the following questions asked J. T. Eldridge, a witness for appellant, on his cross-examination: "You have frequently come down with the engine in front, have you not?" "Yes, I have seen them come down that way." "How frequently have you seen it done? How many times?" "I have seen it done several times years ago." Also each of the following questions asked Albert B. Miller, a witness for appellant, on his cross-examination: "Did you ever see that engine come backward from Coal Bluff down to Brazil?" Also the following: "You have seen that train come down from the east end of the switch with the engine in front, have you not?" The witness answered: "Yes." Also the following: "When they come from Coal Bluff to Brazil they put the engine in the rear, did they not?" The witness answered: "Yes." Also the following: "How did you get around it on that occasion? You say you never saw it come, backed down to Brazil?" The witness answered: "We pull the train down to run around on another track and then shove the trains out and come around on the other end and hitch on and then the engine would be ahead in coming to Brazil." Also the following: "Had there been any trouble about that?" Witness answered: "Not that I know of." Also each of the following questions asked G. B. O'Dell: "There has been no change in the tracks since the accident occurred?" "No change in the tracks." "Have you not seen the train made up that way frequently?" "Yes." It is urged that these questions were not proper unless they were limited to a time at and before the accident, and that they were without the issues in the cause; the question being whether the train at the time of the accident was being run under all the circumstances with care and skill, or in a negligent manner. It is further insisted that they were not proper cross-examination. The testimony in chief of these witnesses was calculated to leave upon the minds of the jury the impression that it was necessary to run the train from

the east end of the Caseyville branch of the appellant's road to Coal Bluff backwards, because there was no turntable out of Brazil on which the engine could be turned, and because the engine, if it came into Coal Bluff in front of the train could not be gotten in front as the train came from that point to Brazil. The evidence sought by the question objected to tended to show that it was not difficult to bring the train with the engine in front to Coal Bluff, and no difficulty at Coal Bluff in changing the engine so as to bring it to Brazil in front. Manifestly the purpose of placing the engine at the rear of the train at the east end of the Caseyville branch was to save the time at Coal Bluff, necessary to change the engine to the other end of the train before starting from that point for Brazil.

Over the objection of appellant, Henry Develin, a witness for appellant was permitted in rebuttal to answer the following questions: "You may tell the jury how frequently, if at all, you have seen stock on the railroad in the vicinity of this collision." The witness answered: "Just east of there. I don't recollect of seeing any just at that crossing where the wreck occurred, but somewhere between that place and where I got on at number eleven I saw stock frequently." The objection made was that plaintiff went into this subject in his examination in chief, and because it is not proper rebutting testimony, and because the question does not fix the time prior to the accident. Also the following: "You may tell if you know anything as to the train men seeing them." The witness answered: "My impression is they knew it." The court struck out the answer. The following was also propounded: "I want you to state to the jury where the miners' train was left after the miners were taken to their work in the mines?" Also the following: "Does the engine remain at the mines or does it leave?" "What trouble is there, if any, in hitching to the west end of the train at the east end of the switch?" The witness answered: "No trouble at all that I know of." The following: "If there is

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any means there of changing the engine, or hitching it on the other end to pull the train down with the engine in front, state how that is done?" The witness answered: "There were two switches there, one on either side of the main switch that goes to Caseyville; the length of the switches, I judge, is about a quarter of a mile." This answer was followed by the following question, to which no objection was made: "What means have they there of changing the engine in the proper way to come to Brazil?" The witness answered: "They could cut loose at the main line and go on the side switch, get on the main line behind it and push it on the main line and be all right for Brazil." The following question was then propounded to the witness over appellant's objection: "How often have you seen that done?" To which he answered: "Many times." We have not given the answer to each of the other questions, but they were all answered. It is claimed that none of them was proper in rebuttal, because appellee had gone into these subjects in the examination in chief of his witnesses. It is further claimed that they had no relevancy to the issue in the case. The admission of this testimony was not error. The witness, in substance, testified that there was no trouble in bringing trains down from the east end of the Caseyville branch with the engine in front, and that there was no trouble in changing the position of the engine at Coal Bluff so as to have it in front of the train in coming to Brazil; that he had seen it done "probably a hundred times." It was proper in rebuttal of the testimony of appellant as to the difficulty of so doing. Witness for appellant testified that the road was fenced, protected by proper cattle-guards, and that an order of the board of commissioners of Clay county prohibited stock from running at large. The legitimate purpose of this testimony was to show that danger was not to be apprehended from stock running at large. It was therefore proper for appellee to show that stock was frequently seen on the road.

The remaining reason for a new trial argued by counsel

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for appellant is that the court erred in giving to the jury instructions numbered three and seven, respectively, asked by appellee. It is insisted that said instruction number three is contradictory to instruction number three and one-half, given at the request of appellant, and that it told the jury it was the duty of the appellant to carry appellee with absolute safety. *Nebeker v. Sullivan*, 99 Ind. 300, is cited, in which it is held that, when the instructions are contradictory and tend to mislead the jury, the judgment will be reversed. Instruction number three is in the following language: "A railroad company engaged in the business of transporting passengers is termed a common carrier of passengers, and where it receives a passenger on its train to be transported from one point to another for hire, its undertaking is to carry him safely to his destination." Instruction number three and one-half referred to, is as follows: "The rule of greatest possible care to be exercised by a railroad company for the safety of its passengers is not to be understood as requiring the utmost degree of care which the mind can attain to or is capable of inventing. It simply means the greatest degree of care that is consistent with the particular mode of transportation. So in this case if you find from the evidence that the train on which the plaintiff was riding was not a regular passenger train, but a miners' train composed of freight or box cars, and was run and operated at the time of the accident in the usual manner in which it had been run and operated for many years prior to the accident and that the train was operated in a manner not careless or negligent, and plaintiff was and had been familiar with the manner of running and operating such train, then I instruct you that the defendant was only required to use the highest degree of care consistent with the running and operation of this particular kind of a train, and if you find that it was so operated at the time of the accident then the defendant would not be liable to plaintiff in this action, because it had fully performed its duty in this

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respect, and if while so being run and operated it came into collision with a horse which suddenly sprang upon the track in front of it, and the collision with the horse was unavoidable and the train was derailed and the plaintiff was injured by reason thereof, the defendant is not liable in this action and your verdict should be for the defendant."

Instruction number three, referred to, told the jury that a carrier undertakes to carry a passenger safely to his destination. This is the unquestioned duty of the carrier. In the performance of this duty, it must exercise the highest degree of practicable skill and care, as stated in instruction three and one-half. Construed together, and all the instructions under the universal rule must be so considered, they were not, in our opinion, misleading. The jury could not have inferred that it was the duty of appellant to carry appellee with absolute safety.

Instruction number four stated that: "Although a common carrier of passengers does not insure the safety of passengers, the law will not tolerate any negligence on the part of such carrier, and if it is guilty of any negligence resulting in the injury of such passenger, it is liable for such injury."

Instruction number seven stated: "If you find from the evidence in this cause that the defendant was guilty of negligence in running its train with the engine in the rear, if it did so run it, and that by reason of so running it the car in which the plaintiff was riding was derailed, by reason of coming in contact with an obstruction on the track, if it was so derailed, whereby plaintiff was injured in the manner described in the complaint, then it is no defense for the defendant to prove that such train so negligently run was operated as skilfully and carefully as a train run in that manner could be operated."

The first instruction, which is lengthy, stated the issues; the seventh informed the jury that if appellee was injured by reason of the negligence in running its train backwards

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instead of forwards, then it would be no defense for the defendant to prove that the train thus run was operated as carefully as a train could be run in that manner. Crediting the jury with the average intelligence of jurors, the instructions given were not misleading. Considered together, they fairly state the law applicable to the evidence in the cause.

We find no error for which the judgment should be reversed. Judgment affirmed.

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[No. 8,169. Filed June 22, 1900. Rehearing denied Nov. 16, 1900.]

MALICIOUS PROSECUTION.—Evidence.—Financial Condition of Defendant.—In the trial of an action for malicious prosecution, it was not error to admit evidence as to defendant's financial condition. *p. 509.*

SAME.—Evidence.—Malice.—Advice of Lawyer.—Where, in the trial of an action for malicious prosecution, defendant introduced evidence to show that he acted upon the advice of a lawyer in instituting the criminal prosecution, evidence that the person referred to did not hold himself out to the public as a lawyer was competent as tending to show that defendant acted upon the advice of one who was not a lawyer. *pp. 509, 510.*

SAME.—Evidence.—Malice.—Advice of Lawyer.—The fact that defendant in an action for malicious prosecution stated the facts to an attorney at law and sought his advice before instituting the criminal prosecution, is not conclusive evidence that he acted without malice, or that probable cause existed. *p. 510.*

SAME.—Probable Cause.—Instructions.—Where, in an action for malicious prosecution, the facts necessary to constitute probable cause were controverted, it was proper for the court to inform the jury that certain facts, if proved, would not constitute probable cause. *pp. 510, 511.*

From the Newton Circuit Court. *Affirmed.*

Daniel Fraser and *W. H. Isham*, for appellant.

R. P. Davidson and *Allen Boulds*, for appellee.

HENLEY, J.—This was an action for damages growing out of the alleged malicious prosecution of appellee by appellant. Appellee recovered judgment in the lower court for \$1,500. The only error assigned in this court arises

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upon the action of the lower court in overruling appellant's motion for a new trial. Counsel for appellee have not favored us with a brief. It is urged by counsel for appellant that the verdict of the jury is not sustained by sufficient evidence. The evidence is conflicting upon all the essential questions in issue. Much evidence was introduced by both parties to this action, and upon the evidence submitted we must regard the questions which were within the province of the jury as correctly decided.

It is next insisted by counsel for appellant that the lower court erred in permitting certain evidence to go to the jury as to the value and extent of the property of the appellant. It is true that the courts of this country are not uniform in their decisions upon this subject. Perhaps, we might say, that the weight of authority is with the appellant. But the question seems to be settled by the courts of this State in favor of permitting evidence as to the value and extent of the property of a defendant in a case of this kind. It has been repeatedly held that in suits for damages, where the wrongdoer is not amenable to the penal laws of the state, that it is within the discretion of the jury to award damages by way of punishment in addition to the compensation for the injuries sustained. This is an action of that character. It is an action for the recovery of damages growing out of a malicious tort. The exact question was before this court in the case of *Sexson v. Hoover*, 1 Ind. App. 65. Also see, *Lytton v. Baird*, 95 Ind. 349; *Farman v. Lauman*, 73 Ind. 568; *Meyer v. Bohlfig*, 44 Ind. 238; *Taber v. Hutson*, 5 Ind. 322; *Johnson v. Smith*, 64 Me. 553; *Winn v. Peckham*, 42 Wis. 493; *Whitfield v. Westbrook*, 40 Miss. 311; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204; *Abbott's Trial Ev.*, p. 654.

It is also complained that the court permitted evidence as to whether there was a business sign or advertisement as a lawyer, or attorney at law, at the office of Newton Sleeper. The witness Sleeper was the attorney to whom appellant

went for advice as to whether or not he should begin the criminal action against the appellee, out of which grew the present suit. We can not understand how this evidence could have harmed appellant. Nor do counsel in any way attempt to show how the same could have resulted in harming the appellant. It has been held in this State that it is not competent to show that in the institution of a prosecution the defendant acted upon the advice of a person not an attorney or counselor at law for the purpose of disproving malice. It seems to us that evidence which tended to prove in any manner that the witness did not hold himself out to the public as a lawyer would be competent as tending to show that the defendant acted upon the advice of one who was not a lawyer.

It is next insisted by counsel for appellant that the court erred in instructing the jury as follows: "The mere fact that a party procures and acts upon the advice of an attorney so obtained does not of itself exempt him from liability, or afford absolute justification of the prosecution. It is merely competent evidence to rebut malice and want of probable cause." We think this instruction states the law. It has always been held in this State that in actions for malicious prosecution, the defendant may prove that before he began the prosecution he made a full and fair presentation of the facts of the case to an attorney at law, who advised a prosecution. The advice must be sought in good faith and for an honest purpose. *Lytton v. Baird*, 95 Ind. 349; *Aldridge v. Churchill*, 28 Ind. 62; *Paddock v. Watts*, 116 Ind. 146. But the fact that the defendant before the institution of the prosecution stated the facts to counsel and sought his advice is not conclusive evidence that he acted without malice or that probable cause existed. *Lytton v. Baird*, *supra*.

Counsel for appellant complain in a general way of the other instructions given the jury. The instructions complained of cover twenty-five pages of the transcript. In one instance only do counsel assign a reason or cite authorities

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to show that certain instructions do not state the law. It is insisted that the court erred in instructing the jury that certain facts as a matter of law were or were not sufficient to constitute probable cause. The facts being controverted it was the duty of the court to inform the jury what was necessary to constitute probable cause, and it could not be error for the court to inform the jury that certain facts, if proved, would not constitute probable cause. The court having the right to decide what is probable cause would certainly have the right to decide what is not probable cause. Upon this question we cite: *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Cottrell v. Cottrell*, 126 Ind. 181; *Taylor v. Baltimore, etc., R. Co.*, 18 Ind. App. 692; *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525.

We have given the questions presented careful consideration and find no error.

Judgment affirmed.

Wiley, J., took no part.

THE CITIZENS' STREET RAILWAY COMPANY v. DAMM.

[No. 8,208. Filed November 20, 1900.]

STREET RAILWAYS.—Personal Injuries. — Complaint.—A complaint against a street railway company for personal injuries charged that plaintiff and her husband were riding in a buggy, and, in attempting to cross defendant's track, their horse took fright, and became unmanageable; that when the horse was on the track in such frightened condition a car was approaching at a distance of from 200 to 400 feet, and plaintiff was in full view of the motorman; that plaintiff could not extricate herself from the buggy, and the horse and buggy could not be removed from the track, and that the car was run against plaintiff, without any attempt on the part of the servants in charge thereof to check the same, and injured her. *Held*, that the complaint stated a cause of action, and a demurrer thereto was properly overruled. *pp. 512-515.*

SAME.—Special Findings. — Verdict.—Answers to interrogatories in an action for personal injuries caused by collision with a street car showed that plaintiff and her husband were out driving, and, in attempting to cross defendant's track, their horse became frightened

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and balked on the track; that when the buggy stopped on the track the car was more than 100 feet away, and the motorman was in a position to see the peril of plaintiff, and could have stopped the car in time to have prevented the collision; that before the collision the motorman sounded the gong and turned off the power, then released the brake and allowed the car to proceed and strike the plaintiff; that plaintiff could have seen the car before attempting to cross the track, and stopped, and thus avoided the collision, if she had looked. *Held*, that the answers are not in irreconcilable conflict with a general verdict for plaintiff. *pp.* 515-520.

APPEAL AND ERROR.—*Record.*—*Marginal Notes.*—*Evidence.*—Questions depending upon the evidence will not be considered on appeal, where the evidence covers over 500 pages of typewritten matter, and the record contains no marginal notes, as required by rule thirty of the Appellate Court. *pp.* 520, 521.

From the Henry Circuit Court. *Affirmed.*

J. W. Ryan, W. A. Thompson and M. E. Forkner, for appellant.

J. N. Templer, C. C. Ball, E. R. Templer, R. S. Gregory, A. C. Silverburg and O. J. Lotz, for appellee.

WILEY, J.—Appellee was plaintiff below and sued appellant to recover damages for injuries received by reason of appellant's alleged negligence. The amended complaint, which was in a single paragraph, avers that appellee and her husband were riding in a buggy drawn by one horse and were crossing Main street where it intersects Plum street in the city of Muncie; that appellant owned and operated a line of street railway on Main street; that while so driving in a careful, cautious, and proper manner, the horse attached to the buggy in which they were riding became frightened, reared, pitched, and became unmanageable, and that appellee and her husband were unable to control the horse, and it was about to run away; that thereupon appellee's husband got out of the buggy and took hold of the horse by the bits in order to manage and hold him; that said horse being unmanageable, passed out, upon, and over appellant's track, while they were exercising all their powers to control him,

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but were unable to do so; that when said buggy was upon said track and said horse in such frightened condition, one of appellee's cars propelled by electricity was approaching appellee in the buggy, at a distance of 200 to 400 feet from where she was upon the track, and the said buggy and appellee were in full view of appellant's motorman and servants in charge of said car; that appellee and her husband by "calls, screams, and loud hallooing and waving of hands at, to, and towards defendant's said motorman, employes, and servants in charge of said car demanding them to stop said car." It is also averred that the space between said approaching car and said buggy, where it was stopped on the track, was an open and level street in full view of said employes, so that they could and did see the condition appellee was in, and that said horse and buggy were on the track most of the time, and when not on, so close to it that the car could not pass without striking them; that said servants could have seen that said horse and buggy were on the track; that the horse was frightened and unmanageable; that she could not extricate herself from said buggy; that said horse and buggy could not be removed from the track, and that in total disregard of appellee's peril, appellant, by its servants, ran said car at a speed of ten miles per hour, without checking or attempting to check the speed, against and upon said horse, buggy, and appellee. It is further alleged that she was unable to get out of the buggy and was unable to get the horse and buggy off the track so as to avoid a collision with the car. The complaint described at great length and with particularity the various injuries appellee received from the collision, and avers that such injuries were received without any fault or negligence on her part or on the part of her husband.

A demurrer for want of facts addressed to the complaint was overruled. Appellant answered by denial. Trial by jury resulted in a general verdict for appellee for \$2,250.

The jury also found specially, as to certain facts, by answers to interrogatories. Appellant moved for judgment on the answers to interrogatories, for a new trial, and for a *venire de novo*, and each of these motions was overruled.

It is proper to say that there were two trials of this cause below. The first trial resulted in a general verdict for appellee, and with the general verdict the jury found specially as to certain facts by answers to interrogatories. After the return of the verdict and the answers to the interrogatories, appellant moved for a new trial and for judgment on the answers to interrogatories notwithstanding the general verdict. The former motion was sustained and the motion for judgment was overruled. All these adverse rulings, including the overruling of the motion for judgment in the first trial are assigned as errors. Appellant's learned counsel have presented their views of the law questions involved in this appeal in voluminous briefs, and most of their discussion is addressed to the question of appellee's contributory negligence. The argument embraces three pivotal propositions: (1) The sufficiency of the amended complaint; (2) the sufficiency of the evidence to support the verdict, and (3) the overruling of the motion for judgment on the answers to interrogatories.

We are not convinced by the argument of counsel that the complaint is defective. The evident theory of the complaint is that appellee was placed in an unexpected and hazardous position by circumstances over which she had no control, from which she could not extricate herself, and that appellant's servants in charge of the car saw her in such condition in sufficient time to have averted the accident by the exercise of ordinary care. It is shown that the accident occurred at a street crossing, and in this connection it must be remembered that the street car company at such point has no superiority of right over that of a person about to cross the track at such point. We think the facts stated in the complaint bring the case within the rule, so far as the suf-

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ficiency of the complaint is concerned, that where one person sees another in a position of peril from which he is unable to extricate himself with reasonable care, it is the highest duty of such person so to act as not to increase the peril, and if he does act in a manner to increase the danger with full knowledge of the facts, it is negligence for which he may be required to respond in damages. See *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436, and cases there cited. See, also, the recent case of *Elwood, etc., St. R. Co. v. Ross*, (Ind. App.) 58 N. E. 535. Here the complaint charges that the servants of the appellant saw the danger in which appellee was placed, and yet continued to run the car at full speed and made no effort either to check or to stop it. This case, so far as the facts charged, is similar in all essential respects to the case of *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372, in which it was held that those in charge of an engine upon a street car track seeing a team of horses near the track showing signs of fright, must, in order to relieve the company from liability, heed the danger, slacken speed, and if necessary to avoid injury, stop the train. See, also, *Louisville, etc., R. Co. v. Stanger*, 7 Ind. App. 179. See, also, *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 298. The demurrer to the complaint was properly overruled.

We will next consider the overruling of appellant's motion for judgment on the answers to interrogatories. The jury found that appellee was driving with her husband for her health; that she was pregnant with child, and had been in that condition for three months; that they drove from Plum street, which intersects Main street, and attempted to cross the latter street along and upon which appellant owns and operates a street car line; that immediately before the collision, the horse appellee's husband was driving balked and was rearing and jumping upon or near the track; that appellee could not have gotten out of the buggy without great danger of receiving bodily injury; that the appellant's employes could have stopped the car in time to have pre-

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vented the collision, if they had used reasonable and ordinary diligence; that when the buggy stopped on the track the car was 125 to 150 feet away, and that appellant's servants could have seen the buggy by the exercise of reasonable diligence; that the said servants checked the speed of said car, but did not stop it; that said servants were guilty of negligence in failing to stop the car and thus have prevented the collision; that as a result of the collision appellee was injured in the head, arm, side and abdomen; that she has not recovered from her injuries; that she was damaged in the sum of \$2,250; that the horse and buggy were dragged by the car twelve to fifteen feet; that the motorman in charge of the car was in a position to see the peril appellee was in for more than 100 feet immediately before the collision; that appellee was not guilty of contributory negligence; that appellee was about twenty-seven years old, possessing good eyesight, good hearing, and possessing all of her natural senses unimpaired; that appellee and her husband, as they approached Main street from Plum street were driving in a trot; that appellee looked west and her husband looked east (the car was approaching from the west); that appellee could have seen the approaching car if she had looked; that she could have heard the car if she had listened; that if she had looked to the west before attempting to cross the track and stopped, she could have avoided the collision; that by thus stopping she would have been delayed from one to two minutes; that appellee knew that appellant operated a line of street cars on said Main street, and ran its cars thereon regularly; that the buggy did not pass over the track before the accident; that appellant's servants immediately before the accident sounded the gong, turned off the electric current and materially reduced the speed; that after so reducing the speed the brakes were released, and the car proceeded without a reapplication of the power while the buggy was on the track, and that appellant's negligence consisted in failing to stop the car after the servants in charge of it saw that appellee's horse was frightened.

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It is earnestly argued that appellant was entitled to judgment on the answers to interrogatories, notwithstanding the general verdict, for the reason that the facts specially found are antagonistic to and in irreconcilable conflict with the general verdict, in that they show that appellee was guilty of negligence which contributed to her injury. If the special finding of facts does show that appellee was negligent, then it would overcome the general verdict and be of controlling influence, for the general verdict finds that she did not contribute to her injury by her own negligence. It is urged that it was negligence for her while riding with her husband to undertake to cross the street car track on Main street, under the facts specially found. Our attention has been called in argument to the rigid and stringent rule governing crossing steam railway tracks that intersect highways and streets, by persons in vehicles and on foot, and many authorities have been cited in support of the rule. That rule, however, is not applicable here, for the reason that persons about to cross a street car track in a city at the intersection of streets are not held to that high degree of care required of persons in crossing steam railway tracks. The right of crossing the street is equal as between a street car and a citizen; neither has a superior right to the other. The right of each must be exercised with due regard for the right of the other, and in such careful manner as not reasonably to abridge or interfere with the right of the other. This equality of right, however, does not absolve one who is about to cross the tracks from the duty of taking proper precautions to avoid accidents. Booth on St. Railway Law, §304; *O'Neil v. Dry Dock, etc., St. R. Co.*, 126 N. Y. 125, 29 N. E. 84; *Buhrens v. Dry Dock, etc., St. R. Co.*, 53 Hun 571, 6 N. Y. Supp. 224. Under what circumstances a person, either walking or riding in a vehicle, may safely attempt to cross a street car track in front of a car must be determined by facts which vary so much in different cases that courts have not attempted to establish specific rules on the subject. But

there have been some decisions resting upon particular facts which illustrate the general rule as to the degree of care that must be exercised. Thus it was held in New York that an attempt to pass in front of a street car running at an ordinary rate of speed, fifty feet distant, is not, as a matter of law, negligence. *Wells v. Brooklyn City R. Co.*, 58 Hun 389, 12 N. Y. Supp. 67. Also, that if there is time to cross before the car arrives, a party is not bound, in order to avoid the charge of negligence, to await until the car has passed because there might be danger of slipping and falling. *Baxter v. Second Ave. R. Co.*, 3 Robt. (N. Y.) 510. It has also been held that where a pedestrian is about to cross a street car track in front of a car approaching at a high rate of speed, and could have done so but for an unavoidable accident, he will not be charged with contributory negligence. *Aaron v. Second Ave. R. Co.*, 2 Daily 127. See, also, Booth on St. Railway Law, §311. The case last cited applies with much force to the facts specially found in this case. As appellee and her husband drove off of Plum street onto Main street, one of them looked in one direction and the other in the opposite direction. It is not found as a fact that they saw or did not see the car, but there was nothing to prevent one seeing it who looked in the direction from which it was approaching. Under the authorities in this State, we must presume that the one who did look toward the car saw it. At that time the car was far enough away to give them ample time to cross the track unless some unavoidable accident should prevent. They were not bound to anticipate any such accident. The jury found that when they reached the track and the horse became frightened, began to rear and plunge, the car was 125 feet to 150 feet from them. This fact alone shows that there was an abundance of time for them to have crossed the track in safety before the car reached the point where they attempted to cross, if the horse had not balked and refused to go. As we have seen, if there was sufficient time to cross, barring unexpected and unavoid-

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able accidents, they were not bound to stop and wait until the car had passed. Under the facts specially found, the court can not say as a matter of law that it was negligence for them to attempt to cross the track. It is found also that if appellee had listened, she could have heard the car, but it is not found as a fact that she did not listen. If she did not listen, and if it is conceded that her failure to listen was negligence, even then such negligence is not as a matter of law such contributory negligence as will prevent a recovery for the injury caused by the collision, unless such failure to listen materially contributed to the accident. "The negligence which prevents a recovery is that which materially contributes to the accident." *Citizens St. R. Co. v. Abright*, 14 Ind. App. 433. The proximate cause of the injury was the frightened and unmanageable condition of the horse, and in the absence of such condition they would have passed over the track in safety.

It is also found that appellant's servants saw, or could have seen by the exercise of reasonable care and diligence, the peril in which appellee was placed by reason of the frightened condition of the horse. The law casts upon persons in charge of a street car the duty of vigilance in observing the danger by collision to persons on the track, even though they may be negligent in being on the track, and to avoid inflicting an injury the speed of the car must be checked, if there is time so to check it, after the danger is observed; and as we have seen, the law goes to the extent of requiring the car to be stopped if necessary to prevent accident. See *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436, and cases there cited; *Elwood St. R. Co. v. Ross, supra*, and authorities there cited; *Watson v. Broadway, etc., Co.*, 43 Hun 636, 110 N. Y. 677, 18 N. E. 482.

The jury found that there was ample time for the motor-man to have stopped the car after seeing, or after he was bound to see, the impending danger in which appellee was placed. Under the facts disclosed by the answers to interrogatories, he had no right to assume that the buggy in

which appellee was riding would get off the track and leave an unobstructed passageway for the car. Some of the answers to the interrogatories are mere conclusions, but this does not destroy their force or efficacy. Eliminating such conclusions, the material facts found are, it seems to us, in perfect harmony with the general verdict. These facts disclose two propositions which are of controlling influence in the decision of this case: (1) That appellant's servants were negligent in failing to stop the car and thus avoid the accident, and (2) that appellee's acts were not the proximate cause of her injury, and hence contributory negligence can not be attributed to her. There was no error in overruling appellant's motion for judgment on the answers to the interrogatories.

Appellant's motion for a new trial was based upon many reasons, but the only one discussed is that the verdict was not sustained by sufficient evidence. The entire argument upon this branch of the case is bottomed upon the assumed proposition that the evidence shows that appellee was guilty of contributory negligence, and that this precludes her right to recover. The consideration and determination of this question require an examination of the evidence. The bill of exceptions containing the evidence covers over 500 pages of typewritten matter. There is not a marginal note on the bill of exceptions. Rule thirty of this court provides: "Where the evidence is set out by deposition or otherwise, the names of the witnesses shall be stated in the margin. The appellant shall also note on the margin all motions and rulings thereon." This rule has been wholly disregarded. Under the rules of this court (and such rules are a part of "the law of the land"), appellant has brought here an imperfect record, upon a question on which it relies for a reversal. The rule in this State is that a party asking a reversal must bring to the appellate tribunal a perfect record. Such record, to be perfect, must not only comply with the various provisions of the statute regulating appeals and

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the preparation of transcripts, but also must comply with the rules of the court. The rules of the court must be construed with the provisions of the statute as constituting the law governing appeals, and hence we can not disregard either. This rule of the court which we are now considering has been strictly adhered to in all the later authorities, and it has been declared that it is not only the right but the duty of the court to enforce it. *Smith v. State*, 140 Ind. 340; *Egan v. Ohio, etc., R. Co.*, 138 Ind. 274; *Smith v. State*, 137 Ind. 198; *Harrod v. State*, 24 Ind. App. 159; *Otis v. Weiss*, 22 Ind. App. 161; *Babcock v. Johnson*, 22 Ind. App. 97; *Ewbank's Manual*, §119; *Elliott's App. Proc.* §204. We decline therefore to consider the question thus raised.

It is also urged that the damages are excessive. This question also depends upon the evidence, and for the same reason we can not consider it.

We have thus disposed of all question discussed by counsel, and we have not found any reversible error.

Judgment affirmed.

OSBORN ET AL. v. STATE, EX REL. JACKSON.

[No. 8,282. Filed November 20, 1900.]

APPEAL.—Joint Assignment of Error.—Review.—A ruling which does not affect all who jointly assign it as error will not be considered on appeal.

From the Howard Superior Court. *Affirmed.*

J. C. Herron and *F. N. Stratton*, for appellants.

N. B. Smith, *C. N. Pollard* and *O. C. Pollard*, for appellee.

BLACK, J.—This was an action on a guardian's bond against the principal obligor and one of his sureties, the other surety having died. These two defendants, as appellants, jointly assign errors, setting forth in their assignment two specifications, as follows: "First. That the court

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erred in overruling the defendant Jesse L. Osborn's separate demurrer to the sixth paragraph of the plaintiff's reply to the first paragraph of defendant Jesse L. Osborn's separate amended answer. Second. That the court erred in overruling the defendant Chas. Osborn's separate demurrer to the sixth paragraph of the plaintiff's reply to the first paragraph of the defendant Chas. Osborn's separate amended answer."

If there was error as assigned in the first specification it was an error affecting the appellant Jesse L. Osborn alone; and the error, if any, in the ruling assailed in the second specification affected only the other appellant, Charles Osborn. Each of the alleged errors being assigned by the appellants jointly, and not being available in favor of both the appellants, no question is properly presented for decision; for an error assigned, to be available for any appellant, must be available in favor of all who join in assigning it; and a ruling which does not affect all who jointly assign it as error will not be considered by the appellate tribunal. *Hubbard v. Bell*, 4 Ind. App. 180, and authorities there cited; *Board, etc., v. Fraser*, 19 Ind. App. 520.

Judgment affirmed.

TOWN OF ODON v. DOBBS, BY HIS NEXT FRIEND.

[No. 8,277. Filed November 21, 1900.]

MUNICIPAL CORPORATIONS.—Negligence.—Complaint.—In an action against a town for damages, the complaint contained allegations showing that in the night-time plaintiff, while riding in a wagon drawn by gentle horses, driven by a careful driver, was, without any fault on his part, thrown from the wagon and injured because of the defective construction of a bridge near the crossing of the two principal streets of the town; and that the defects in the bridge were known to the town, and unknown to the plaintiff and those with her. *Held*, that the complaint stated a cause of action. pp. 523, 524.

SAME.—Streets Must Be Kept In Safe Condition.—It is the duty of a town to keep its streets in reasonably safe condition, not alone in the center, but from curb to curb. p. 525.

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From the Daviess Circuit Court. *Affirmed.*

J. W. Ogdon, E. Inman, C. K. Tharp and J. Downey,
for appellant.

W. R. Gardiner, C. G. Gardiner, C. E. Barrett and E.
A. Brown, for appellee.

HENLEY, J.—This was an action by appellee against appellant to recover damages on account of an injury received caused by the alleged negligence of appellant in failing to keep its streets in repair. The complaint is in two paragraphs. The two paragraphs of complaint are substantially the same. Both paragraphs were ineffectually challenged in the lower court by demurrer. The cause was put at issue by an answer in general denial. There was a trial by jury and a verdict in favor of appellee. Over appellant's motion for a new trial, judgment was rendered upon the verdict. Appellant has assigned as error the overruling of its demurrer to each paragraph of complaint, and the overruling of its motion for a new trial.

The facts averred in the complaint, upon which appellant's negligence is based, are that appellant is an incorporated town; that two of the streets most traveled in said town are Main and Elm streets, which streets cross each other at right angles, Main street running east and west, and Elm street running north and south; that Main street is fifty-eight and one-half feet wide, and Elm street is fifty feet wide; that at the intersection of said streets there is and was a ditch or water course two feet deep and eight feet wide, which runs along the north side of Main street between the sidewalk and the wagon road; that in order that the public or persons using said Elm street might travel over said street, coming from the north and turning to the west on Main street, it was necessary that appellant construct and maintain over and across said ditch or water course a bridge or culvert. That at the time said accident occurred appellant disregarding its duty, and regardless of the safety of

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the people who might travel over said street, negligently and carelessly constructed and maintained a wooden structure over and across said gutter and ditch, the top of which was covered by twelve planks each about eighteen inches wide. Eight of the planks were sixteen feet long and four of them were fourteen feet long, and they were so placed that at the south side of the west end of said structure the ends of four of the planks did not extend as far west by about two feet as the other planks on the top of the culvert. That appellant had caused said street to be worked in such a manner that there was nothing in the appearance of the street to indicate the whereabouts of said structure or the careless and negligent manner of its construction, all of which appellant well knew. That on the night of the 13th day of February, 1898, appellee, with others, was riding in a heavy wagon returning from church to her home. That the wagon was drawn by two gentle horses driven by a careful driver. That none of the persons in said wagon were familiar with said streets or with said culvert nor with the depth or width of the ditch or water course, and while carefully and prudently proceeding along said Elm street southward, for the purpose of turning west on Main street, and while passing over said culvert, and because of the improper, careless, and negligent manner in which it was constructed, the right-hand wheels of the wagon ran off of the west end of said structure, causing appellee to be thrown from her seat in the wagon, and into said gutter, with great violence, and that the wheels of the said wagon ran against and over appellee before the team could be stopped. That appellee was by said accident permanently and seriously hurt and deformed, all without any fault or negligence upon her part.

We think the complaint states a cause of action. The defective condition of the culvert, the absence of knowledge on the part of appellee of the defect, the knowledge of the appellant that the defect existed, are facts clearly averred in the complaint. Appellee avers in her complaint that

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she was injured "while passing over said structure, and because of the improper, negligent, and careless manner of the construction thereof as aforesaid, and not otherwise," and that she was free from any fault contributing to her injury. There are, in our opinion, no special averments tending to show contributory fault upon the part of appellee. It was appellant's duty to keep its streets in a reasonably safe condition for travel, not alone in the center of the street, but from curb to curb. *City of Decatur v. Stoops*, 21 Ind. App. 397. The complaint clearly shows the violation of a duty imposed upon appellant and a resulting injury to appellee.

The other questions argued by counsel for appellant relate to the giving and the refusal to give to the jury upon the trial certain instructions. Those given cover every phase of the case as made by the evidence. They were as favorable to appellant as the law applicable to the evidence would justify, and it appears from the evidence that the jury returned a just verdict. *Stockwell v. Brant*, 97 Ind. 474; *State v. Ruhlman, Ex.*, 111 Ind. 17; *Sanders v. Weelberg*, 107 Ind. 266; *Norris v. Casel*, 90 Ind. 143; *Woods v. Board, etc.*, 128 Ind. 289.

We find no reversible error. Judgment affirmed.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. WRIGHT.

[No. 3,217. Filed November 22, 1900.]

CONVERSION.—*Pleading.*—*Evidence.*—In an action against a railroad company for the conversion of property delivered to it for transportation, the company may, under a general denial, show that the property was taken from its possession by writ of replevin issued in an action instituted by a third person. pp. 526, 527.

SAME.—*Common Carrier.*—*Warehousemen.*—Where a railroad company voluntarily delivers goods to the wrong person, such company is liable for conversion, either as common carrier or warehouseman, without regard to the question of negligence. p. 528.

From the Delaware Circuit Court. *Affirmed.*

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J. W. Ryan and *W. A. Thompson*, for appellant.

W. W. Orr, *F. H. Stradling* and *O. T. Sharp*, for appellee.

BLACK, J.—This was an action commenced in the court below on the 16th of January, 1896, by the appellee against the appellant. The original complaint is not in the record. It was superseded by an amended complaint filed on the 19th of September, 1898.

On the 5th of March, 1896, the appellant filed its petition verified by the affidavit of James L. Simmons, asking that one Louisa J. Martin be substituted as defendant instead of the appellant. On the 12th of March, 1896, the court, as appears from the entry made, "having seen and examined said petition of the defendant herein and the affidavit in support of the same, and having heard the evidence in support of said petition, finds for the defendant on said petition; and the court being fully advised in the premises, now sustains said motion and orders that said Louisa J. Martin be, and she is now, made a party hereto and to this case," and she was ordered to file an answer; "and the court declined and refused to discharge the defendant herein, to which ruling of the court in refusing to discharge the defendant at the time objected and excepted." This refusal to discharge the appellant is assigned as error.

The amended complaint, filed more than two and one-half years later, consisted of two paragraphs. In the title and in the first paragraph no mention was made of Louisa J. Martin, or any party other than the appellee and the appellant. At the close of the second paragraph it was said: "And Louisa J. Martin is now made a defendant to this action by order of the court in this cause, and is required to show cause why plaintiff should not recover judgment as herein prayed." Otherwise the relief demanded in each paragraph was asked for against the appellant alone.

Not only are we without any proper information as to the contents of the complaint, as it was when the application

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to make Louisa J. Martin a defendant and to discharge the appellant was heard and determined, but also we are not informed as to the evidence on which the court acted. No attempt appears to have been made to put into the record the evidence introduced at this hearing in support of the petition or against it. We have not sufficient knowledge of the foundation of the court's conclusions to authorize us to hold that there was error in the refusal to discharge the appellant.

The appellee by his amended complaint sought the recovery of damages for the wrongful conversion to its own use by the appellant of a pair of "bike" wheels and steel shields delivered to the railroad company at Tiffin, Ohio, to be carried and delivered to the appellee at Muncie, Indiana.

The appellant answered in two paragraphs, the first being the general denial. A demurrer to the second paragraph was sustained. In the second paragraph the appellant admitted that it received and had in its possession the pair of bike wheels mentioned in the complaint, the property of the appellee, and transported them from Tiffin to Muncie, and alleged that while they were in its possession, on the 9th of January, 1896, and before the commencement of this action, they were taken from the appellant and delivered to Louisa J. Martin, under a writ of replevin issued in an action of replevin instituted by her against the appellant before a justice of the peace, the answer setting forth the facts in detail.

We need not set out the answer at length, for if it showed a sufficient excuse for the failure to deliver the goods to the appellee by reason of a justifiable delivery to a third person under valid legal process, its material facts, being inconsistent with the charge of wrongful conversion in the complaint, were admissible in evidence under the general denial also pleaded.

It is true that evidence of a demand and failure to deliver would tend to prove a conversion, and, if unexplained,

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it would authorize a finding of conversion. But under the general denial the appellant might explain and justify its failure by showing a good excuse therefor, and might thereby repel the inference of a wrongful conversion. *Ontario Bank v. Steamboat Co.*, 59 N. Y. 510; *Gerard v. Jones*, 78 Ind. 378; *Ford v. Griffin*, 100 Ind. 85; *Swope v. Paul*, 4 Ind. App. 463.

The appellant's motion for a new trial was overruled. The only assigned ground for a new trial suggested in argument is that the verdict was contrary to law. Reference is made in argument to the well established distinction between the liability of a common carrier as an insurer and the liability of a warehouseman for negligence.

The complaint contained two paragraphs, in one of which an agreement to carry and safely deliver to the appellee was alleged, while in the other there was no averment of an agreement. In each it was alleged that the appellant failed and refused to deliver the goods to the appellee and wrongfully converted them to its own use.

If after the goods were transported and stored, and while the appellant had toward them the relation of a warehouseman, they were delivered by the appellant to a wrong person through the appellant's negligence, it might be required to respond in damages as for a conversion to the owner who had delivered the goods for transportation to himself, either under or without special contract. Indeed, for such delivery to a wrong person, not upon compulsion by legal process, but voluntarily, though through mistake, either a common carrier or a warehouseman would be responsible as for conversion, without regard to any question of negligence. See *Merchants Despatch, etc., Co. v. Merriam*, 111 Ind. 5; *American Ex. Co. v. Stack*, 29 Ind. 27; *Lawson on Bailments*, §§16, 22.

It scarcely need be said that the rule that a voluntary or permissive misdelivery renders the bailee liable as for con-

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version does not apply where the property has been taken from the bailee by due process of law.

No reversible error has been properly indicated to us by the appellant. Judgment affirmed.

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[No. 3,819. Filed November 22, 1900.]

REAL ACTIONS.—*Mesne Profits.*—An action for *mesne* profits may be maintained independently of an action for the possession of the real estate. *p. 529.*

SAME.—*Mesne Profits.—Complaint.*—A complaint in action for *mesne* profits which fails to allege that plaintiff was entitled to the possession of the real estate during the time he seeks to recover for the use and occupation is fatally defective. *pp. 529, 530.*

From the La Porte Circuit Court. *Affirmed.*

N. F. Wolfe, E. E. Weir, M. H. Weir and Lemuel Darrow, for appellants.

F. E. Osborn and H. W. Sallwasser, for appellee.

COMSTOCK, J.—The question argued by appellants' counsel upon this appeal is whether a separate action for *mesne* profits, independent of an action for the possession of real estate, can be maintained under our statute. No brief has been filed on behalf of appellee. In our opinion this question should be answered in the affirmative.

It still remains to determine the sufficiency of the complaint, a demurrer to which for want of sufficient facts to constitute a cause of action against appellee was by the trial court sustained, and which action of the court is the only error assigned.

The complaint avers that the plaintiffs (appellants here) are and have been since June 13, 1897, the owners in fee simple of certain real estate (describing it); that the defendant has had possession of the said premises unlawfully and without right and has kept plaintiff out of possession

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of the same from the 13th day of June, 1897, up to the 1st day of October, 1898; that the value of the use and occupation of the premises is, etc., etc.; that the defendant has appropriated the same to his own use, to the damage of the plaintiffs in the sum of \$200; wherefore they demand judgment against defendant for \$200, and other proper relief. The complaint fails to aver that the appellants were entitled to the possession of the premises during the time the appellee had possession without right. It does not aver that they were unlawfully kept out of their possession.

The complaint is fatally defective in failing to show that appellants were entitled to the possession during the time for which they seek to recover for the use and occupation.

Judgment affirmed.

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[No. 3,321. Filed November 23, 1900.]

REAL ACTIONS. — *Mesne Profits.* — *Possession.* — An action may be maintained, after the surrender of possession to plaintiff, for the rents and profits of land during the wrongful holding by defendant.

From the La Porte Circuit Court. *Reversed.*

N. F. Wolfe, E. E. Weir, M. H. Weir and Lemuel Darrow, for appellant.

F. E. Osborn and H. W. Sallwasser, for appellee.

COMSTOCK, J.—The question presented by this appeal and argued by counsel for appellant (the appellee has filed no brief) is the same question attempted to be raised in *O'Reilly v. Long*, ante, 529, viz., whether under the statute of this State a separate action for *mesne* profits independent of an action for the possession of real estate (the owner of the fee being in possession at the commencement of the suit), can be maintained. The complaint in the present cause contains an averment that plaintiff (appellant) was entitled to the possession of the real estate in question at the time he

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was wrongfully kept out of its possession, an averment which was lacking in *O'Reilly v. Long, supra*, and for the want of which this court held the complaint in that case insufficient.

At common law when a person occupied the lands of another not a tenant but adversely, or under circumstances which showed that he did not recognize the owner as his landlord, the remedy was in an action in trespass for *mesne* profits after a recovery in ejectment. The primary object of the action of ejectment was to set at rest controversies in respect to the possession of lands, and to determine the rights of the respective claimants in a single action. But the action had a secondary object dependent upon the success of the plaintiff in attaining the first, viz., damages for the wrongful withholding by the defendant of the possession of the land; or, in other words, the *mesne* profits, that is, the profits of the land during the wrongful holding. Section 1062 Burns 1894, §1052 Horner 1897, gives a right of action for the possession of real estate to any one having a valid subsisting interest therein and a right to possession.

In many, perhaps most, of the states, it is provided by statute that the plaintiff may in the same action recover not only the possession of the land, but also damages for the wrongful use and occupation. Section 1070 Burns 1894, §1068 Horner 1897, so provides. Section 1071 Burns 1894, §1059 Horner 1897, provides that if the interest of the plaintiff expires before the time in which he could be put in possession, he shall obtain a judgment for damages only. As under our statute a recovery may be had in one suit for possession and for use and occupation of the premises wrongfully withheld, it would seem necessarily to follow that when possession had been obtained, whether by legal proceedings or by the voluntary surrender of the premises by the wrongdoer, the right to the *mesne* profits would still remain to the injured proprietor, and could be enforced.

It has been held in Pennsylvania that a defendant who

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quits the premises in controversy pending the ejectment suit is not liable for *mesne* profits afterward accruing. *Mitchell v. Friedley*, 10 Pa. St. 198. In *Camarillo v. Fenlon*, 49 Cal. 205, it is held that if in the ejectment suit there is no finding of the value of the use and occupation of the premises, the plaintiff is not entitled to damages by way of *mesne* profits. Had appellant in the case at bar obtained possession by legal proceedings, without any claim for the use and occupation, a different question than the one before us would be presented.

Under §1071, *supra*, when the claim for possession no longer exists, the plaintiff may still recover damages. In the present case the possession only of the plaintiff has satisfied the claim for the primary remedy formerly obtained by action of ejectment. While we are unadvised of adjudications on the precise question, we think that reason and analogy give the appellant a right of action, and that the trial court erred in sustaining the demurrer for want of facts to his complaint.

The judgment is reversed for further proceedings in harmony with this opinion.

EX PARTE JENKINS.

[No. 8,576. Filed November 23, 1900.]

EXECUTORS AND ADMINISTRATORS.—*Ex Parte Application for Letters of Administration.—Discretion of Court.*—Although the circuit court has a discretion in the granting or refusing applications for letters of administration, yet where the proceeding is *ex parte* and a verified application shows the party entitled to letters, they should be granted. *p. 533.*

SAME.—*Letters May Be Granted Though No Tangible Assets.*—The right to letters of administration does not depend upon the existence of tangible assets to administer. Letters may be granted in order that an action may be prosecuted. *pp. 533, 534.*

SAME.—*Letters of Administration to Prosecute Action on Official Bond of Sheriff for Permitting Death of Prisoner.*—Where a sheriff of a county permitted a prisoner to be taken from the county jail and put to death, the widow of the deceased prisoner was entitled to

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letters of administration, although the only asset of such deceased prisoner's estate was the right of action on the official bond of the sheriff for breach of official duty, and such breach had occurred more than two years prior to the application for such letters. pp. 534, 535.

From the Ripley Circuit Court. *Reversed.*

W. R. Crawford, W. H. Najdowski and Merrill Moores,
for appellants.

ROBINSON, C. J.—Lulu C. Jenkins applied to the Ripley Circuit Court for letters of administration *de bonis non* on the estate of her deceased husband, William H. Jenkins. The court denied her application and upon that action of the court she predicates error. Upon the application of the petitioner this cause was advanced upon the docket of this court.

The proceeding below was *ex parte*, and in her verified petition she shows that her husband, William H. Jenkins, was an inhabitant of Ripley county, Indiana; that in September, 1897, he was held by Henry Busching, the sheriff of Ripley county, as a prisoner in the county jail at Versailles, and that on or about the 15th day of September, 1897, a mob composed of divers persons entered the jail and killed Jenkins and other prisoners then in the custody of the sheriff; that Jenkins left an estate worth less than \$500, which was, by a decree of court, vested in the petitioner as widow; that except the above there is not now and never has been any administration of his estate, nor has any executor or administrator ever been appointed; that decedent left no children; that there are no claims due from or to the estate except a claim for the killing of decedent, which she desires to prosecute.

While it is true the circuit court has a discretion in granting or refusing applications for letters of administration, yet where the proceeding is purely *ex parte* and a verified application shows the party entitled to letters, they should be granted. The right to letters does not depend

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upon the existence of tangible assets to administer. "There are instances" said the court in *Toledo, etc., R. Co. v. Reeves*, 8 Ind. App. 667, "in which such appointment may become proper and necessary in order to prosecute some claim of indeterminate value, or to make satisfaction of record of a claim which had been paid but not satisfied, and perhaps for other purposes."

It appears the court found generally the settlement of the estate; that there were no assets and no administration pending, as set out in the petition, and also found that Jenkins was killed September 15, 1897; that the petition was filed February 23, 1900, and that any right of action arising out of the killing expired by limitation of law September 16, 1899, and since that date has not constituted an asset of the estate. In an application for letters, where there are no tangible assets to administer, the application should show some claim or the right to enforce some claim in the estate's favor. The application does this, and being verified and *ex parte* its averments must be taken as true.

The application states, among other things, "that on or about the 15th day of September, 1897, the said William H. Jenkins was in the full enjoyment of his health and life, but was held by Henry Busching, the sheriff of said Ripley county, Indiana, as a prisoner in the county jail at Versailles, Indiana, and that on or about the 15th day of September, 1897, a mob composed of divers persons entered into the said jail at Versailles, Indiana, and killed the said William H. Jenkins and other prisoners in the custody of said sheriff at said place either by shooting or clubbing or hanging."

It is unnecessary to cite authorities to the effect that when a sheriff takes property of any kind into his possession by virtue of a writ, he is bound to take ordinary care of the property and prevent its deterioration or destruction, and for a failure in this regard he is liable on his bond. There certainly can be no reason for saying that his duty as to

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care is not at least equally obligatory in respect of a prisoner who is in his custody by virtue of his office. In *State v. Gobin*, 94 Fed. 48, Baker, J., said: "When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond. *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818; *Hixon v. Cupp*, 5 Okl. 545, 49 Pac. 927."

The sheriff of the county has the care and custody of prisoners committed to the county jail. The duty the sheriff owes to the State to keep a prisoner committed to his custody and deliver him over to the proper authority at the proper time, is no more compulsory than is the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health. If he permits a prisoner to escape or to be taken from his custody the fault is *prima facie* his, and there has been *prima facie* a breach of official duty for which he is liable on his official bond. The sheriff's conduct in this instance may have been such that a right of action accrued to decedent before his death which would not necessarily abate at his death. But in this case it is not necessary that we should decide, and we do not decide, anything upon that question.

It was necessary that the petitioner show a *prima facie* right to letters. She might under certain circumstances prosecute an action against those who killed her husband although more than two years had elapsed since the killing. The limitation does not necessarily and of itself prevent the action. The defendant, or defendants, as the case might be, may take advantage of that fact or it may be waived. Whether they would or would not do so can not determine the petitioner's right to letters. Having by her petition shown a

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prima facie right to letters, her petition should have been granted.

Judgment reversed, with instructions to grant the petitioner's application. The clerk is directed to certify this decision to the lower court at once. •

BURRIS v. BAXTER ET AL.

[No. 8,065. Filed November 27, 1900.]

MUNICIPAL CORPORATIONS.—*Sewers.—Enforcement of Assessments.—*

Complaint.—A complaint to enforce the collection of an assessment for the construction of a sewer must show that a proper petition for the improvement was presented, or that the resolution for the improvement was concurred in by two-thirds of the members of the city council.

From the Blackford Circuit Court. *Reversed.*

J. A. Hindman, for appellant.

C. W. Kinnan, J. S. Dailey, F. C. Dailey and *A. Simmons*, for appellees.

BLACK, J.—This was a suit to enforce assessments for the construction of a sewer in the city of Montpelier, known as the Green street sewer, in favor of the appellee Samuel A. Baxter, the assignee of the appellee Edwin J. Miller, the contractor, against three parcels of real estate owned by the appellant. There were three paragraphs of complaint, each relating to the assessment on one of the three parcels; otherwise the paragraphs were substantially alike. The appellant answered in five paragraphs, the first a general denial, each paragraph being addressed to the entire complaint. The action of the court in sustaining the demurrer of the appellee Baxter to each of the paragraphs of the answer except the first is assigned as error. It is also assigned that the court erred in not carrying back the demurrer of the appellee Baxter and sustaining it to the complaint.

The objections urged in argument against the complaint were like those urged to the complaint in the case of *Spauld-*

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ing v. Baxter, ante, 485, except that it is contended that the complaint is insufficient because it fails to show that any petition for the work was presented or that the resolution ordering the work was concurred in by two-thirds of the members of the city council. It is true that to give jurisdiction to the council over the particular improvement, its action must be invoked by a petition of "the owners of two-thirds of the whole line of lots or parts of lots," measuring only the front line of such lots as belong to persons resident in the city, §4288 Burns 1894, §6771 Horner 1897; or the common council must order or cause the improvement, "with the concurrence of two-thirds of the members thereof." §4294 Burns 1894, §6777 Horner 1897. A complaint to enforce an assessment for such an improvement should show that the common council had jurisdiction over the particular matter by virtue either of such a petition or of such a concurrence of members. See *City of Logansport v. Legg*, 20 Ind. 315; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *Baker v. Tobin*, 40 Ind. 310; *Yeakel v. City of Lafayette*, 48 Ind. 116; *City of Connersville v. Merrill*, 14 Ind. App. 303; *Cleveland, etc., R. Co. v. Jones*, 20 Ind. App. 87. The complaint in the case at bar was insufficient in this regard, as suggested by counsel. There was no allegation relating to any petition; and in relation to the ordering of the construction there was no allegation indicating what portion of the members of the council concurred.

Counsel for appellant has discussed the question as to the sufficiency of the fifth paragraph of answer. The question thus presented was decided in *Spaulding v. Baxter, supra*; and, adhering to the conclusion reached by us in relation to the second paragraph of answer in that case, we must hold that the fifth paragraph of the answer now before us would have been a sufficient answer to a good complaint.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

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[No. 3,091. Filed November 27, 1900.]

WORK AND LABOR.—*Bill of Extras.—Breach of Contract.—Complaint.*—A charge in a complaint by a plastering contractor, in an action to recover for extra work and certain expenses incurred in carrying out his contract, that under the contract defendant was to notify plaintiff when to begin work, that he notified him, and plaintiff took a large number of men a distance of sixty miles to commence the work and found the building not ready, and was compelled to return again, at great expense, states a cause of action. pp. 539-542.

APPEAL AND ERROR.—*Motions.*—The action of the court in overruling a motion to strike out parts of the complaint is not a ground for a new trial, and such ruling incorporated in a motion for a new trial presents no question for review. pp. 542, 543.

SAME.—*Motions.*—A judgment will not be reversed because of the action of the court in overruling a motion to strike out parts of a complaint. p. 543.

EVIDENCE.—*Contracts.*—In the trial of an action by a subcontractor for extra work, the court erred in permitting a witness to testify as to the work plaintiff was required to do under the contract, where the original contract and plans and specifications were made a part of the contract, and were not ambiguous, indefinite or uncertain pp. 544, 545.

CONTRACTS.—*Work and Labor.—Bill of Extras.—Instructions.*—Where a contract sued upon by a subcontractor for extra work in plastering a school building embraced the original contract and plans and specifications, which provided that any changes or modifications in the contract or specifications could only be made in writing, by the parties to the original contract, an instruction to the effect that plaintiff could not recover for extra work or material, except for crooked walls, unless it was shown that a change, in writing, was made in the plans and specifications requiring extra work or extra material, was improperly refused. pp. 545, 546.

SAME.—*Construction.—Instructions.*—In an action by a subcontractor to recover for extra work and material in the construction of a building, the question as to what plaintiff was required to do under the contract was a matter for the determination of the court, and not for the jury. pp. 546, 547.

From the Daviess Circuit Court. *Reversed.*

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C. K. Tharp, John Downey, D. J. Hefron and Charles Harrington, for appellants.

J. W. Ogdon, Ephriam Inman, A. J. Padgett and J. A. Padgett, for appellee.

WILEY, C. J.—Appellants Morse and Morse were partners and building contractors. Appellants Brown and Brown were partners and also building contractors. As such, they entered into a contract with the board of school trustees of the city of Washington, in Daviess county, Indiana, for the erection of a public school building. Appellee and one Thankmar Langner were plastering contractors, under the firm name of Carl Langner & Co., and as such, contracted with appellants to plaster said school building for an agreed sum. The amount fixed by the contract was paid them. Before the beginning of this action, Thankmar Langner assigned all of his interest in the contract to appellee, and the latter brought this action to recover for extra work and certain expenses incurred in carrying out his contract. The amended complaint is in a single paragraph, to which a demurrer for want of facts was overruled. The issues were joined by an answer and reply; trial by jury; verdict and judgment for appellee.

The errors assigned are that the court erred in overruling the demurrer to the complaint; that the court erred in overruling the motion to strike out parts of the complaint; that the court erred in overruling the motion for a new trial, and in permitting appellee to file a remittitur. These several questions will be disposed of in their order.

The complaint and the exhibits thereto are of great length and we will notice the averments of the former only in so far as may be necessary to determine its sufficiency. It is averred that the contract between appellants and the school board was executed by appellants Morse and Morse, for and on behalf of all the appellants; that the contract between appellants and appellee and his partner was signed by Morse and Morse only, for and on behalf of appellants;

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that appellee and his partner did not sign such contract, but that they accepted the same and did the work thereunder. The several items for which a recovery is asked are: (1) Certain expenses incurred in going from Evansville to Washington with employes, to begin the work, upon notice from appellants that the building was ready for plastering, when such building was not in fact ready, and appellee had to return with his men; (2) for doing extra work and furnishing extra material not embraced in the contract; (3) for extra work in plastering blackboards; (4) for extra work and materials in plastering vestibule arches; (5) for extra work and materials required to be done and furnished by appellee in plastering and straightening crooked walls; (6) for extra work required of appellee by reason of the fact that appellants failed properly to protect said building from cold, whereby certain of the plastering froze, and appellee was required to take it off and replace it with new plaster; (7) for extra work in taking off and replacing a large quantity of inferior laths furnished by appellants, they being required to furnish good laths under their contract; (8) for extra work in tinting divers ceilings, which was not required by the contract. The contracts between appellants and the school board, and appellants and appellee are in writing and are made exhibits to the complaint. A copy of the specifications for the building is made a part of the contract. It must be conceded that if either of the items above enumerated is a just charge against the appellants, the complaint is good as against a demurrer for want of facts. In view of the averments of the complaint, and the provisions of the contract between appellants and appellee, we are inclined to the view that at least one of said items is recoverable in this action. The complaint avers that appellee resided in Evansville, Indiana. We judicially know the location of the cities of Evansville and Washington, and know that they are about sixty miles apart. The contract between appellant and appellee provides that when the building became

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ready for plastering, appellants were to notify appellee of that fact in writing, and appellee was required to complete his work in four weeks from the receipt of such notice. The complaint avers that appellants did notify appellee in writing that the building was ready for plastering, and that upon receipt of such notice he immediately went from Evansville to Washington for the purpose of commencing said work, and took with him a large number of men who were in his employment, and was ready and prepared to commence said work at once; that when he arrived there, he found that said building was not ready for plastering, and he was compelled to return to Evansville with his men, whereby he incurred a large expense, etc. The failure of appellants to have the building ready for plastering after notifying appellee that it was ready, and he incurred expense in attempting to comply with his contract, is such a breach of the contract as will render appellants liable for resulting damages. A party will not be permitted to take advantage of his own wrong to escape liability for resulting injury. This averment of the complaint shows an actionable breach of the contract, and even if no other breach is properly charged, the complaint would be sufficient as against a demurrer for want of facts. Counsel for appellants indulge in some argument to the effect that appellants were not required by the terms of their contract to give appellee notice in writing when the building would be ready for plastering. The contract required by its express terms that appellee should complete his work "within four weeks from the time of receiving a written notice from the parties of the first part [appellants] that said parties and building are ready for said parties of the second part, ready for said plastering work." The contract further provided that for every day in excess of the four weeks specified in which to complete the work, the appellee should forfeit \$50 per day. We must construe this contract to mean that when appellants had the building ready for plastering they were

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required to give appellee written notice thereof, and it was his duty to complete the work within the time prescribed. He had a right to rely upon the information given him in writing and to proceed at once to the performance of the duty required of him by the contract.

The next question discussed by counsel is the overruling of the motion to strike out parts of the complaint. This question is not presented by the record for our consideration. The motion and the ruling thereon are not brought into the record by a proper bill of exceptions. The motion to strike out was filed and overruled January 5, 1899, to which ruling the appellants excepted and were given ten days in which to file their "special bill of exceptions on the ruling of the court on said motion to strike out." No such bill of exceptions was filed within the time given by the court. Appellants' motion for a new trial was overruled February 2, 1899, and sixty days time was given in which to prepare and file a bill of exceptions. Within this time, appellants did file their general bill of exceptions. This paper is entitled: "Bill of exceptions and statement of the evidence." In the general bill of exceptions, appellants have embraced the motion to strike out, but the bill fails to show that the court made any ruling thereon, or that any exceptions were reserved. The rule that when time is given in which to file a bill of exceptions it must be filed within the limit of the time given has so often been decided that it stands unchallenged.

The record does not show that appellants filed a special bill of exceptions embracing the motion to strike out, and the ruling thereon, within ten days given in which to file it. The failure so to file it is not cured by attempting to embrace it in the general bill of exceptions, time for which was given, upon the overruling of the motion for a new trial. The time allowed for filing a bill of exceptions upon overruling a motion for a new trial covers only matters relating to the trial, and does not include collateral motions,

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such as motions to strike out, to make more specific, etc., made and overruled before the issues are closed and which do not constitute causes for a new trial. *Baltimore, etc., R. Co. v. Countryman*, 16 Ind. App. 139; *Hoffman v. Henderson*, 145 Ind. 613. In the case last cited, it was held that time given by the court upon overruling a motion for a new trial can not extend back and take up rulings made in the formation of the issues. Referring to §626 Horner 1897, which provides for objecting and excepting to rulings upon questions of law, and for saving such questions by a bill of exceptions, the court, by Jordan, J., said: "By the express terms of this statute, it applies to and includes only such rulings or decisions of the court made during the trial, and which are authorized to be assigned as reasons for a new trial, and which are so assigned in the motion. See, also, Elliott's App. Proc., §813; *Ryman v. Crawford*, 86 Ind. 262. ♣

A motion to strike out a part of a pleading has no place in the trial of a cause within the meaning of the statute. It has to do with the issues and not with the trial, and hence, under §559 Horner 1897, it is not a reason assignable for a new trial. In the case before us, appellants assigned as one of the reasons for a new trial that the court erred in overruling their motion to strike out parts of the complaint. As such action of the court was not a ground for a new trial, its incorporation in the motion presents no question for review. But if the question were properly presented, and the court was in error in its ruling, it would not be ground for a reversal, for in this State the courts of final resort do not reverse a judgment for an adverse ruling on a motion to strike out a part of a pleading. *Hoffman v. Henderson*, 145 Ind. 613.

This brings us to an examination of the questions embraced in the motion for a new trial. There were a great many reasons assigned for a new trial, but as we have concluded that the record shows reversible error, we will notice

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only those upon which we base our decision. These relate to the admission of evidence over appellant's objections, and the giving and refusing to give certain instructions.

We enter upon the discussion of these questions, remembering that the contract under which appellee did the work was in writing, and that by the express provisions of that contract, the plans and specifications and the contract between appellants and the school trustees for the erection of the building, all of which were in writing, are made parts of appellee's contract to do the plastering. It follows, therefore, that he was bound by these, for the specifications, the contract between appellants and the school trustees, and his own contract, must be construed together as one. These contracts and the plans and specifications being in writing, and not being ambiguous, indefinite or uncertain, it became a question of law for the court to construe them. It was not, therefore, the province of a witness or the jury to put a construction upon them.

Appellee while testifying in his own behalf was asked these questions: "State whether or not under the specifications and your contract, you were required to plaster the two vestibule arches? State whether or not the specifications and your contract in this case included and required you to tint the ceilings of the high school building? State whether or not under the specifications and your contract, you were required to plaster the spaces where the blackboards were to go?" Other questions of a like character were asked the witness, and also other witnesses, but they need not be repeated here. All of these questions were answered in the negative, and hence appellee was permitted to construe the contracts and specifications. During the progress of the work, the contracts and specifications provided that as to all matters of dispute as to the correct interpretation and construction of the specifications, the architects were the sole arbiters, but when this case was tried, that period had passed, and the duty of interpretation and con-

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struction devolved upon the court. It was not the province of a witness to put a construction upon any of the provisions of the contract or specifications, and hence it was error to permit appellee to answer the questions above quoted. This rule of evidence is so familiar that it hardly admits of discussion. The authorities are numerous and of the many we cite the following: *Reid v. Klein*, 138 Ind. 484; *Guaranty, etc., Assn. v. Rutan*, 6 Ind. App. 83; *Indianapolis, etc., Co. v. Herrman*, 7 Ind. App. 462; *Prather v. Ross*, 17 Ind. 495; *Richmond, etc., Co. v. Farquar*, 8 Blackf. 89; *Scott v. Hartley*, 126 Ind. 239; *Van Camp, etc., Co. v. Hartman*, 126 Ind. 177; 27 Am. & Eng. Ency. of Law 840, note 3; *Sigsworth v. McIntyre*, 18 Ill. 126.

Instruction number two, tendered by appellant and requested to be given to the jury, and which the court refused to give, is as follows: "If the jury should find from the evidence that the plaintiff and the defendants made and entered into the contract which is filed with the complaint marked exhibit C, and you should further find that the provisions of such contract marked exhibit A and the specifications marked exhibit B were not modified or changed by the school trustees and the said T. J. Morse & Son, then the court instructs you that in order for the plaintiff to recover anything for extra work or extra material, he must show by a preponderance of the evidence that a change in writing was ordered and made by the school trustees, in the plans and specifications, which required extra work or extra materials, and if you should find that said school trustees did not order or make in writing any change in such specifications, requiring extra work or extra materials, there can be no recovery in this action for any claim for extra work or extra materials, and as to any claim for such extra work or extra materials, except on the score of crooked walls, you should find for the defendants." This instruction, as applied to the pleadings and the facts disclosed by

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the evidence, was a correct statement of the law and should have been given. The instruction was a clear, succinct and plain statement of the law. The contract sued upon, and as we have seen it embraces the specifications and the contract between appellants and the school trustees, provides that any changes or modifications in the contract or specifications could only be made by the trustees and the original contractors. Appellee's claim was largely based upon extra work done and extra materials furnished outside of, and not provided for by the specifications. The specifications and contract also provided that any changes to be made could only be made upon the order of the trustees in writing. The instruction under consideration goes to the vital provisions of the contract, and the jury are told that unless the contract and specifications are so modified and changed, appellee could not recover for the extra work and materials for which he sued. As no other instruction given by the court covered the subject-matter of instruction number two tendered by appellants, it was reversible error to refuse to give it.

Instruction number two given by the court on its own motion submitted to the jury a question of law with which they had nothing to do. By this instruction, it was left with the jury to find from the evidence what the contract was between appellants and appellee, and also to determine from the evidence whether or not the contract marked exhibit A and the specifications marked exhibit B were a part of that contract. This was misleading and an erroneous statement of the law. The court by this instruction left it with the jury to determine for themselves what the contract was between appellant and appellee, and to put their own construction upon it. There was in fact no controversy as to what the contract was. By the contract marked exhibit C, the specifications marked exhibit B and the contract marked exhibit A were made a part of it, and it was the duty of the court so to instruct the jury. The three exhibits

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constituted one contract, and appellee was bound by all their provisions, so far as they related to his particular work. As to what he was required to do under the provisions of the contract was not a question for the consideration of the jury, but for the court. Instructions four, five, and six given by the court on its own motion, also cast upon the jury the duty of construing certain provisions of the specifications as to whether or not such specifications required or did not require appellee to do certain extra work for which he here seeks to recover. As it was the duty of the court to construe the contract, the giving of these instructions was error. The authorities above cited under the discussion of the admission of improper evidence are applicable here, and to which reference is made.

Other questions are discussed by counsel, but as they are not likely to arise in a subsequent trial of the cause, and as the judgment must be reversed for the reasons given, it is unnecessary for us to consider them.

Judgment reversed, and the court below is directed to grant appellants a new trial.

THE CITY OF FORT WAYNE v. PATTERSON,
ADMINISTRATOR.

[No. 8,100. Filed November 27, 1900.]

MASTER AND SERVANT. — Negligence. — Complaint. — In an action against a city for damages, the complaint set forth that plaintiff's intestate was employed by defendant city to assist in the digging of a trench six and one-half feet deep, preparatory to the laying of water-mains; that while intestate was thus engaged at a point where the ground was compact and hard, he was directed by defendant's superintendent to go to another point, where the trench had been dug by other workmen, to dig bell-holes in the bottom of the trench, and where the banks or walls of the trench were composed of earth of a loose and unadhesive character, which fact was unknown to deceased, but well known to the defendant; that without any fault on the part of the deceased the trench caved in, causing bodily injuries from which death resulted. *Held*, that the complaint stated a good cause of action. pp. 549-556.

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MASTER AND SERVANT.—*Answers to Interrogatories.*—*General Verdict.*

—*Conflict.*—Where an employe of a city was digging bell-holes at the bottom of a deep water-main trench dug by other workmen, and was killed by the caving in of the walls because not properly braced, answers to interrogatories propounded to the jury showing that the deceased was experienced to some extent in such work, and that by the exercise of his senses of sight and feeling he could have learned of the danger, are not in such conflict with a general verdict in favor of the plaintiff as to render such general verdict erroneous pp. 556, 557.

SAME.—*Contributory Negligence.*—*Safe Place to Work.*—Where a person employed by a city to assist in the digging of a trench six and one-half feet deep, preparatory to the laying of water-mains, was engaged at the work at a point where the walls of the trench were solid and firm, and was ordered to another part of the trench, dug by other workmen, where the walls of the trench were composed of gravel and loose earth, the fact that in getting from one point to the other the employe walked along the bottom of the trench and had good opportunity to notice the difference in the character of the walls was not sufficient to charge him with contributory negligence, since he had a right to assume, in the absence of warning or notice, that the city had furnished him a safe place to work. pp. 557, 558.

APPEAL.—*Joint Assignment in Motion for New Trial.*—*Instructions.*

—A joint assignment, in a motion for a new trial, that the court erred in the giving or the refusal to give a series of instructions will not be considered on appeal, where appellant's attorney has failed to present in his brief an argument against the ruling of the trial court as to each instruction in the series. p. 559.

TRIAL.—*Failure of Jury to Answer Interrogatories.*—In the trial of an action against a city for the death of a person employed to assist in the work preparatory to the laying of water-mains, which death was caused by the caving in of the walls of a trench dug by other workmen, the following interrogatory, among others, was propounded to the jury: "If you answer that there was any secret, hidden, latent, or unexposed danger upon or along the line of said trench, state fully and clearly what it was." *Held*, that upon the failure of the jury to return an answer to the interrogatory, it was not error for the court to refuse to require such answer, since the interrogatory was too general in its nature. p. 560.

SAME.—*Opinion Evidence.*—*Notice.*—In the trial of an action against a city for the death of an employe, caused by the caving in of a water-main trench, another person employed on the work at the same time was permitted to answer a question calling for a conversation had with the city superintendent, in which conversation witness

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had refused to do the work afterwards assigned to the deceased, for the reason that "it was not safe." *Held*, that the question was not objectionable as calling for an opinion of the witness, since it was adapted to show notice to the city. *p. 560.*

From the Allen Superior Court. *Affirmed.*

J. M. Barrett, S. L. Morris and W. H. Shambaugh, for appellant.

T. R. Marshall, W. F. McNaghy, P. H. Clugston and G. F. Felts, for appellee.

BLACK, J.—The appellee, as administrator of the estate of Patrick Sheehy, deceased, brought his action against the appellant to recover for the death of his intestate. Three paragraphs of complaint were held sufficient on demurrer. In the first paragraph, it was in substance alleged (omitting introductory matter), that on and before the 24th of May, 1897, the appellant owned and operated a system of water-works in the city of Fort Wayne, used to supply the citizens with water, in consideration of compensation paid by them, by way of a specific tax known as water rent; that in order to extend said system, the appellant, on the day above mentioned was engaged in extending a water main along one of the streets of said city and in excavating a trench in said street wherein to lay a pipe in which to conduct water for delivery to additional consumers, and had a large force of men employed in the prosecution of such work as common laborers, one of whom was appellee's intestate; that he, so employed, assisting in said work was ordered and directed, with others, by the appellant through its proper officer, the inspector of water-works, who was the superintendent of said work, having, under authority conferred by the appellant, full charge and control thereof and of the workmen employed thereat, to proceed from a place where he was, where the ground was compact and hard, and where the banks were firm, to another point in said trench, and to dig certain holes in the bottom thereof, called and known as bell-holes; that said latter point was one where

said trench had been caused by the appellant to be excavated, in common with the rest of said trench, to a depth of six feet and six inches, and to a width of two feet, and the appellant, by its said inspector and superintendent, had caused the earth taken therefrom to be carelessly and negligently thrown out and deposited and piled up to the height of about five feet upon one of the banks of the trench, near the edge thereof, without said bank being shored or braced or in any way made secure against falling in, and where the upper stratum of the material of said street, of a thickness of about two feet, was composed of a body of closely compressed and compact soil mixed largely with gravel; that at said point, unlike the part of the ditch where the intestate had been at work previously, the middle and lower portions of the banks were composed of earth of a loose and unadhesive character, of such a nature as to render the piling thereon of the earth taken from the trench liable to cause the bank whereon it was so piled to cave in and endanger the lives of persons in the ditch opposite thereto; that, as appellant well knew, all the material of the banks of the ditch at this point was filling, or made earth, placed there but a short time before for the purpose of raising the roadway above high water, that of all this the intestate had no knowledge or notice; that he, in obedience to said order, did go along in said trench to the point where said bell-holes were so ordered to be dug, the digging of which required great care and attention in order to comply with measurements accurately made, and said work had to be performed in the bottom of said trench, where no knowledge could be gained of the danger resulting from the negligence of the appellant in so loading said bank with earth under the conditions that then and there existed; and so, without knowing and appreciating the conditions thereat and the danger likely to result therefrom, the intestate entered that portion of the trench, and, relying on the care of the appellant, under whose direction said portion as well as all other portions

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of the trench had been constructed, and without knowing the danger, he at once proceeded to do the work so assigned him; that while he was so engaged and but a few moments after he had entered that portion of the trench, without any fault on his part, and because of the negligence and carelessness of the appellant acting through its said officer in so carelessly and negligently piling the material taken from the trench on the bank thereof without said banks being shored, braced, or otherwise secured against falling in, "the bank on which said pile of earth was so placed, in consequence of the great weight of the material so piled upon it and the loose and incohesive character of the material or filling in the middle and lower portions of the sides of said bank, caused the same to give way and cave in, together with the mass of earth piled on said bank and the heavy crust of combined gravel and other material, composing that part of said ground near the surface, and, without any fault or negligence on his part, to fall upon and against" the intestate with such great force as to wound, bruise, and crush him in such a manner as to cause his death within a few hours thereafter; wherefore, etc.

The second paragraph of complaint was in most respects like the first, with somewhat greater particularity. It was alleged that the trench for the water-main was being excavated along St. Joe boulevard, commencing at its intersection with Lake avenue and extending northward for about 600 feet, the trench, constructed along the east side of the street, being divided into sections, each twelve feet long, one of which sections was assigned to each of the laborers; that at a point about 250 feet from the south end of the trench, it approached near the center of the street, there being at this place a curve in the trench to accommodate it to the course of the street, which was not straight and not of uniform width; that the southern portion of the trench for 250 feet was straight; that the intestate, as a common laborer assisting in the prosecution of the work, had been

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employed by the appellant in digging and excavating one of the southern sections, where the earth was solid, compact, and cohesive and exceedingly hard; that this place was safe and secure and there was no danger of the caving of the banks or necessity for bracing or shoring the banks to prevent caving in; that said trench was being dug in common with the rest of the trench, to the depth of six feet and six inches and to the width of two feet; that the appellant, through its said inspector and superintendent, had ordered and directed its said laborers to pile up all the earth from the trench on its west bank and near the edge thereof; that said pile extended throughout the entire length of the trench and in some places it was about five feet high, and as close to the edge of the trench as it could be placed; that the intestate was about five feet and six inches in height, and was an inexperienced man at the work at which he was engaged; that after he had completed the excavation of the section so assigned to him, he was ordered by the appellant to proceed along the bottom of the trench in a northerly direction from the place where he had thus been at work, to another point therein, and there to perform certain specific service other than the excavating which he had been engaged in doing, namely, to dig certain holes in the bottom of the trench called and known as bell-holes; that the point to which he was thus directed to go, and to which he did go, was 250 feet from the southern end of the trench, and was a place where the appellant had caused the trench to be excavated, in common with the rest of the trench, to the depth of six feet and six inches and to a width of two feet, and there was at this point a curve in the trench, the convex side of which was in the west bank, and the appellant had caused the earth taken from the trench at this point to be negligently and carelessly thrown out and deposited and piled up to the height of about five feet upon the west bank and as near the edge of the trench as it could be placed, all of which was done without said bank's being

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shored or braced or in any way made secure against falling in. There were averments like those in the first paragraph relating to the character of the materials of the banks at this point and the knowledge of the appellant and the want of knowledge of the intestate; also, that this portion of the trench had been so excavated by other and different persons, and the intestate was without previous knowledge of the condition thereat, of the banks and of the earth piled thereon, and by reason of his stature and of the way in which he had proceeded thereto, did not know, and by the exercise of ordinary care, prudence, and diligence could not have known of the nature and character of the loose and unadhesive soil at this point, and of the nature and character of the banks thereat; that relying on the care of the appellant, and without knowledge of the danger, the intestate proceeded to a point about three feet north of the south end of said curve in said trench, and there undertook the work so assigned to him, etc.

In the third paragraph of complaint, besides averments much like those in the first, it was stated that, notwithstanding the dangerous condition of the banks at the curve of the trench, the appellant, so acting through its said inspector and superintendent, whose duty it was to inspect and examine said work, in order that the appellant might know the condition of said work and thus provide for the safety of its said laborers, failed to inspect the character of the material of said banks at said point and to ascertain and determine the probable effect of the piling of the earth taken from the trench on said bank as aforesaid. It was also alleged that the appellant suffered and allowed the intestate to incur the peril resulting from the dangerous character and condition of said bank by going, as he did, and had occasion in the course of said special employment to do, along, and being in, said trench at said point, without warning or informing him of the dangerous character thereof, he having at the time no previous knowledge or information of the character

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and condition of the bank at said latter point; nor was such danger so manifest as to be observed and appreciated by a person exercising ordinary or reasonable care, situated as the intestate was; that almost immediately after his arrival at said point, by reason of such carelessness and negligence of the appellant in carelessly and negligently failing to inspect, etc., and in suffering and allowing him to proceed, etc., without warning or informing him of the danger, and in prosecuting said work without said bank's being shored, etc., and in so carelessly and negligently causing the material taken from the trench to be piled up as aforesaid, the bank, in consequence of, etc., fell, etc.

It is suggested against the complaint by the appellant that neither paragraph charges the appellant with any duty toward the decedent; that his work was that of an independent contractor, and therefore the rule as to a master's duty to furnish a safe place in which to work has no application in this case. We can not agree with this view of the pleading. It seems quite clear that the complaint in each paragraph showed the existence of the relation of servant and master between the decedent and the municipal corporation acting through its proper officer, who had charge and control of the work as the representative of the city and assigned the tasks to the common laborers. It does not appear in any paragraph that the decedent was employed solely to dig the section to which he was at first assigned, or solely to dig a section or sections of the trench, and that he was taken from the safer work for which he had been employed and directed to perform other more hazardous work for which he had not been employed, though counsel in argument would seem to think that the second paragraph was framed upon such a theory. On the contrary, each paragraph seems to proceed upon the theory that the decedent was employed by the appellant as a common laborer to assist as such in the work of laying an additional watermain, and in the course of his employment was assigned tasks

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of different character, but all within the scope of his original employment. Yet when the trench had been excavated to the intended depth, and that branch of the work had been completed for the appellant by a number of workmen engaged upon different sections, the decedent having performed his part of this work by digging a section where the earth was compact and hard and the sides of the trench did not need shoring or bracing and gave no indication of danger, he was sent by the appellant and placed at work upon another necessary and special kind of work, the making of bell-holes in the bottom of the trench at a distance from the safe place where he had been working. The decedent did not make the place in which he was at work in constructing bell-holes. There the trench had been excavated for the city by other workmen, and as to the decedent that place for work had been made by the city, and he was assigned to it by the city as a place wherein to do a specific kind of work, for the safe performance of which there was needed a trench not liable to cave in while the special work was being done therein with reasonable care, skill, and diligence. There was no essential connection between the work of the decedent in digging his section at the southern end of the trench and his making bell-holes near its central portion. It was substantially the same thing in effect as if not having done any other work in connection with the laying of the main, he had been employed to make bell-holes in a trench wholly prepared for that stage of the work by the city through its other workmen. There is, it would seem, the same distinction between such a case and one where the danger is caused by the servant himself in the course of his work whose risks he has assumed, as, for instance, where there is a caving in of a trench which he is making, as exists between the latter case and one of injury of a servant from the caving in of a negligently prepared trench wherein he is at work laying or calking pipes or repairing machinery.

In *Kranz v. Long Island, etc., R. Co.*, 123 N. Y. 1, 25 N.

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E. 953, the plaintiff's intestate was ordered to clean or aid in cleaning water-pipes placed under ground. A trench was opened for that purpose by a section man and laborers some hours earlier, which was a necessary step to furnish a suitable place and proper opportunity for the performance of the intestate's duty. While he was in the trench engaged in disconnecting the pipes, the earth caved in upon him and he died from suffocation. The court said: "Those who opened the trench were performing the master's duty to the deceased in preparing a suitable place and opportunity for the labor of the intestate in discharge of his duty. * * *

When the master ordered the intestate to perform his work as a machinist in the trenches opened and prepared for him, he had a right to assume that the place had been made reasonably safe by the master through other and competent servants employed by him. * * *

Whether the trench was opened with reasonable care, whether any danger was obvious to the deceased, whether greater precaution should have been exercised against the falling of the bank, whether the agents employed were skilful or inexperienced, and so, whether on all the facts the defendant was negligent, are questions of fact to be solved by the jury." See, also, *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075, a case of injury from the falling in of the sides of a trench to one employed to lay pipe therein; *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542, an action for injuries suffered in consequence of the caving in of a ditch bank while the plaintiff was at work connecting water-pipes in the ditch. We do not discuss the complaint further than is needed to meet the objections to it urged by the appellant, which are without plausible support.

There was an answer in denial, and a jury returned a general verdict for the appellee with answers to interrogatories. The appellant's motion for judgment in its favor on the answers to interrogatories was overruled. Much of the argument of counsel in discussing this ruling is sufficiently

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disposed of in what we have already said. There was no material conflict between the general verdict and the special findings in answer to interrogatories. The facts that the decedent was experienced "to some extent" in digging and working in trenches of water-works, and that he had dug bell-holes in such trenches in 1896 and 1897, and that by the exercise of his senses of sight and feeling he could have told what kind of soil constituted the banks of the trench where he was injured, are not, singly or together, in irreconcilable conflict with the general verdict, in support of which we must indulge the presumption that it was fully supported by the evidence upon every question in issue, except so far as the contrary is established by the special findings.

The court overruled the appellant's motion for a new trial. In discussing the question as to the sufficiency of the evidence, counsel for the appellant contend that the danger was so manifest that the decedent was chargeable with contributory negligence. The intestate, pursuant to the order of the city's officer in charge of the work, went from the place where he was first engaged near the south end of the trench to the place where the fatal injury befell him, by walking along the bottom of the trench, the banks of which were higher than his head. At the place where the bank caved in upon him and others, there was a curve, and the superintendent of the work had caused the earth taken from the excavation here to be piled upon the convex bank very near to the trench to avoid the obstruction of the street. Whatever might be concluded as to the ability and opportunity of the decedent to observe the greater looseness of the lower strata of the bank at this point, it appears that he did not have opportunity to know fully the danger arising from this heavy load of earth upon the convex bank. Though the work of making bell-holes was within the general scope of the decedent's employment, he had a right to assume, in the absence of warning or notice, when he went to the performance of the specific work which he was ordered to do,

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that the city through its representative had not made the place where he was thus to work unsafe through its negligence. *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 124, 6 L. R. A. 584.

It is well settled that the master and the servant do not stand upon an equality of duty to inspect the place where the servant is to work and to detect dangerous defects therein. The servant is not bound to search the place for latent and hidden defects or perils, but is only required to observe such obvious defects and perils as the exercise of reasonable care, skill, and diligence on his part, according to the circumstances, will enable him to know or discover. The employer's ignorance of a condition which renders unsafe the place occupied by his employe in the service assigned to him constitutes no defense for the employer in an action against him for injury to the employe occasioned by such unsafe condition, when by the exercise of due care and inspection the employer could have discovered and remedied the defects or prevented the incurring of the danger therefrom. It is the duty of the employer to keep himself informed of the condition of such a place; and therefore notice of such condition to the employer will be presumed after the lapse of a sufficient time; and where the place in which work is to be performed has been prepared by the employer himself or by the employer through some of his employes, and thereafter another employe is sent into such place to do such work, the employer must be treated as chargeable with such knowledge of its condition as he might have gained by such proper inspection as the employer had opportunity to make, having regard to the use to which the place is to be put by the employe thus sent into it.

It was for the jury, taking into consideration, under the instructions of the court, all the circumstances shown by the evidence, to determine whether or not there was a failure on the part of the decedent to exercise reasonable care for his own safety; and we see no ground upon which we would be

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authorized to interfere with the conclusion announced on this subject by the jury in their general verdict.

In the motion for a new trial the appellant assigned as the fourth cause the giving to the jury upon the plaintiff's motion twelve instructions, indicating them by their numbers; and as the fifth cause, the giving by the court upon its own motion instructions numbered from one to twelve inclusive, and as the sixth cause the court's refusal to give to the jury as requested by the defendant nine instructions, indicating them by their numbers. The fourth and fifth assignments of causes each concluded with the words, "to the giving of which and each of which the defendant then and there excepted;" and the sixth assignment concluded with the words, "to the refusal to give which and each of which the defendant then and there excepted."

Though the appellant excepted to the giving of each of the instructions given and to the refusal of each of those refused, these causes for a new trial did not present for consideration the giving or the refusal of any instruction separately. The fourth cause could not be available unless all the instructions designated in it were erroneous. The same is true as to the fifth cause; and the sixth cause could not be available unless it was error to refuse any one of the instructions designated in it. The appellant has presented argument against only three of the instructions embraced in the fourth cause, and against only three of those embraced in the fifth cause, and in favor of only four of those embraced in the sixth cause. Not being called upon to examine any of these instructions not discussed by counsel, we can not indulge any presumption against the action of the court in relation to the instructions not discussed, and we can not consider the argument of counsel upon those discussed. *Hoover v. Weesner*, 147 Ind. 510; *Stewart v. Long*, 16 Ind. App. 164; *Storrs, etc., Co. v. Fusselman*, 23 Ind. App. 293; *Pape v. Hartwig*, 23 Ind. App. 333; *Harrod v. State, ex rel.*, 24 Ind. App. 159.

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The jury returned answers to all the interrogatories submitted to them, except one numbered thirty-eight, as follows: "If you answer that there was any secret, hidden, latent, or unexposed danger upon or along the line of said trench, state fully and clearly what it was." No answer having been returned to this interrogatory, the appellant, thereupon, and before the discharge of the jury, moved the court to require an answer thereto. This the court declined to do. The jury was not requested in any interrogatory, as this one seems to presuppose, to state whether or not there was any such danger, and had not stated that such danger existed. Whatever bearing upon the case the existence or non-existence of such a danger at the place where the decedent was fatally injured could properly have, there could be no error in refusing to require an answer to so general an interrogatory, if it could be said to be strictly relevant to any answer returned by the jury.

A witness who dug one of the sections, testifying on behalf of the appellee, having testified that he had a conversation that day with Mr. Iten, the appellant's superintendent of the work, about digging bell-holes, was asked for the appellee what this conversation was, what was said. The appellant's objection to this question having been overruled, the witness answered, "He wanted me to dig bell-holes, and I would not do it. I said it was not safe." It is contended, in effect, that the question was objectionable as calling for an opinion of the witness. The question did not call for opinion evidence by its form. It was adapted to show what knowledge or notice the superintendent had concerning the matter of digging the holes, and the answer was relevant for such purpose. We can not find reversible error in permitting the propounding of the question.

Matters relating to the examination of other witnesses, the same in substance as that last disposed of above, are adverted to by counsel, but they need no further notice.

Judgment affirmed.

GRAY ET AL., RECEIVERS, v. COVERT, SHERIFF, ET AL.

[No. 8,204. Filed November 27, 1900.]

RECEIVERS.—*Appointment in Another State.—Foreign Corporation.—Attachment.*—A receiver appointed for a foreign corporation in another state does not thereby acquire such title to the property of the corporation situate in this State as to defeat an attachment subsequently issued at the instance of a creditor by a court in this State.

From the Vanderburgh Superior Court. *Affirmed.*

J. G. Owen, H. M. Logsdon, H. Mason and A. J. Vene-
man, for appellants.

G. A. Cunningham, for appellees.

COMSTOCK, J.—The controversy in this case arises between the appellants as receivers, and the appellee, Mitchell, Tranter & Company, an attaching creditor of the Herring-Hall-Marvin Company. But a single question is involved: Does a receiver appointed for a foreign corporation in another state thereby acquire such title to the property of the corporation situate in this State as to defeat an attachment subsequently issued at the instance of a creditor by the courts of this State?

The Herring-Hall-Marvin Company is a foreign corporation organized under the laws of the state of New Jersey. On December 23, 1897, the appellants were appointed its receivers by the circuit court of the United States for the district of New Jersey. The bond and oath of the receivers are set out in the record and bear date December 24, 1897. It also appears, although at what date is not shown by the record, that one Samuel Fitton was appointed receiver by the court of common pleas of Butler county, in the state of Ohio, in a suit brought by William and Moses Mosler. This cause was removed to the circuit court of the United States for the southern district of Ohio, western division, and the

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Honorable William H. Taft, judge of that court, on December 31, 1897, removed Fitton and appointed the appellants as receivers in his place. It also appears from the record that the appellants had been appointed receivers in New York, Pennsylvania, and Kentucky. So far as the record shows, no receiver was ever appointed or applied for in the State of Indiana.

The appellee, Mitchell, Tranter & Company, being a creditor of the Herring-Hall-Marvin Company, on December 30, 1897, filed its complaint, affidavit, and bond in the superior court of Vanderburgh county, and on the same day caused an attachment to issue, which came into the hands of the sheriff of said county. The sheriff having levied on and taken into his possession the property of the Herring-Hall-Marvin Company involved in this suit, the appellants, as receivers of the company, on May 27, 1898, brought their suit in the court below to recover from the sheriff and Mitchell, Tranter & Company possession of this property.

The cause was submitted to the court, who found for the defendants and rendered judgment accordingly. A motion for a new trial assigning as causes that the decision of the court was contrary to law and not sustained by sufficient evidence was overruled, and this ruling is the only error assigned by the appellants.

Recognizing the rule of the appellate courts of this State that a judgment will not be reversed upon appeal, upon the evidence only, when it fairly tends to sustain the finding of the court or the verdict, counsel for appellant insist that in the case at bar there is no evidence to sustain the finding and judgment of the trial court. They contend that the appointment of appellants as receivers of said company, it being effected upon the petition of the president pursuant to a resolution of the board of directors of the company, constituted a voluntary assignment, being equivalent to an assignment by a voluntary deed of assignment of all the company's property for the benefit of its creditors without the

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intervention of a court; that such appointment had the effect of transferring to them all of the property of the insolvent corporation wherever situate, so as to defeat appellees' claim under the attachment issued. This claim is based upon the statute of New Jersey, by authority of which the receivers were appointed, proof of which was made and which provides: "All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchise, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

Counsel for appellant quote from *Union Savings Bank v. Lounge Co.*, 20 Ind. App. 325; *Hurd v. City of Elizabeth*, 41 N. J. L. 1. In *Union Savings Bank v. Lounge Co.*, *supra*, it is held that a general assignment for the benefit of creditors, by a resident of another state, in conformity to the laws of such state, passes to the assignee title to a general deposit of money in a bank in this State, and that such deposit can not be attached by a creditor of the assignor in this State. In *Hurd v. City of Elizabeth*, *supra*, it was held that a receiver appointed in a foreign jurisdiction might sustain a suit to recover property in the courts of New Jersey provided the rights of creditors did not intervene. It does not decide that a receiver had the right to take property as against an attachment creditor. Counsel also cite *Chicago, etc., R. Co. v. Keokuk, etc., Co.*, 108 Ill. 317; *Bagby v. Atlantic, etc., R. Co.*, 86 Pa. St. 291; *Killmer v. Hobart*, 58 How. Pr. (N. Y.) 452. In *Bagby v. Atlantic, etc., Co.*, *supra*, it was held that where a receiver had been appointed by the courts of another state, the courts of Pennsylvania, on the ground of comity, would recognize his appointment provided the same did not conflict with the rights of citizens of Pennsylvania, and further that a creditor residing in the state where the appointment was made was so far bound by the decree that he could not leave his own state to come into Pennsylvania and attach the property of the corporation and

thereby avoid the effect of the appointment of a receiver by the courts of his own state. In *Chicago, etc., R. Co. v. Keokuk, etc., Co.*, *supra*, the court held that the powers of a receiver are coextensive only with the jurisdiction of the court appointing him, and a foreign receiver will not be permitted, as against the claims of creditors resident within the state, to remove from the state assets of the debtor, it being the policy of every government to retain in its own hands the property of the debtor until all domestic claims against it have been satisfied. It was further held that where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession though he take it in the performance of his duty into a foreign jurisdiction. In *Killmer v. Hobart*, *supra*, it was held that receivers appointed in New Jersey and operating a railway as such receivers in New York, but having property in their hands as such receivers in New York, could not be sued in the courts of the last named state and an attachment issued in such suit will be vacated.

The statute of New Jersey could have no effect beyond the territorial limits of that state. While it has been held in this and other states that a voluntary assignment for the benefit of creditors executed in one state transfers the title of property of the assignor wherever situate, it does not follow that title to the property of an insolvent passes to a receiver. The assignment is the act of the debtor; the right to transfer his property may be exercised by him independently of statute. Receivers are appointed by courts pursuant to statute. The act of the legislature is limited in its operation to the state.

The question under consideration has been decided by the Supreme Court of this State in the case of *Catlin v. Wilcox, etc., Co.*, 123 Ind. 477, 8 L. R. A. 62. The facts were as follows: Clapp & Davies, of Chicago, were indebted to cer-

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tain judgment creditors in that city. They were also indebted to the Wilcox Silver Plate Company and others, of the state of Connecticut. At the same time, Bagley & Oberreich, at La Porte, Indiana, were indebted in a considerable sum to Clapp & Davies. One of the judgment creditors instituted proceedings against the firm in Chicago, and on April 14, 1897, Catlin was appointed receiver. The court made an order requiring Clapp & Davies to execute a deed of general assignment transferring all their partnership property and effects to the receiver. Subsequently, in the month of June, the Wilcox Silver Plate Company brought an attachment suit in the La Porte Circuit Court against Clapp & Davies, and Bagley & Oberreich as garnishees. Other creditors became parties thereto. Catlin, the receiver, intervened and claimed the property attached by virtue of his prior appointment. The attachment creditors were sustained. In the course of the opinion, the court say: "A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court, whose jurisdiction may be aided, but in no wise enlarged or extended, by his appointment. His power is only co-extensive with that of the court which gives him his official character. While it has been held that a court may appoint a receiver, and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment of its own force gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right outside the jurisdiction of the court making the appointment." Upon the question of non-resident attaching creditors, the court say: "It is said, however, that the principles of comity which control in aid of the receiver of a foreign court, who is seeking to obtain possession of a fund, should only be suspended in their operation in favor

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of domestic creditors, and that inasmuch as the attaching creditors in the present case are all non-residents of the State, the aid of the court should have been extended to the receiver and denied the creditors. While this position is not without support, it is not in our view maintainable. Although non-residents, the attaching creditors are properly in our courts, pursuing a remedy which the statute confers upon foreign as well as domestic creditors. Until the legislature shall declare a different policy, the rights of a foreign creditor against the property of a debtor must be regarded by the courts as in all respects the same as those of resident creditors, so far as respects proceedings in attachment and garnishment. The rule which commends itself to our judgment is thus declared: 'Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own state and that of another. Before the law and its tribunals there can be no preference of one over the other.' *Hibernia Bank v. Lacombe*, 84 N. Y. 367; *Rhawn v. Pearce*, 110 Ill. 350; *Warner v. Jaffray*, 96 N. Y. 248; *Paine v. Lester*, 44 Conn. 196. This rule governs the more recent decisions." In *Woolson v. Pipher*, 100 Ind. 306, it was held that the voluntary assignment of his property by a failing debtor in the state of Ohio for the benefit of his creditors where possession of his goods is not taken by the assignee, will not defeat the liens of attaching creditors. To the same effect is *Pitman v. Marquardt*, 20 Ind. App. 431.

While counsel for appellants insist that the receivers having been appointed under the law of New Jersey, vesting in them the property of the Herring-Hall-Marvin Company, "wherever situate," prior to the bringing of the attachment proceedings by appellee, that the judgment of the trial court was without evidence to sustain it. They further insist that the record shows that the receivers had taken actual possession of the property of the insolvent company, before the commencement of the attachment proceedings, and that

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therefore even under the rule stated in *Woolson v. Pipher, supra*, requiring actual possession of the property to perfect appellants' title, the judgment must be reversed. Whether appellants had taken actual possession of the property in question before the commencement of the attachment proceedings was a question of fact to be determined by the trial court. The burden of showing the actual possession in the receivers was upon the appellants. We can not say after reading the evidence that the finding of the trial court upon this question was without support.

It is argued by counsel for appellee that the questions discussed by counsel for appellants can not be considered for the reason that it affirmatively appears that all the evidence introduced upon the trial of the cause has not been made a part of the record. As in our opinion the judgment of the trial court should be affirmed, we do not further refer to the question of the completeness of the record.

Judgment affirmed.

THE AURORA AND LAUGHERY TURNPIKE COMPANY v.
NIEBRUGGEE ET AL.

[No. 8,220. Filed November 27, 1900.]

CORPORATIONS.—Toll Roads.—Action for Toll.—Defense.—Want of Repair.—Where a turnpike company was incorporated by special act of the General Assembly in the year 1848, the company in accepting the charter impliedly agreed to maintain the road in good repair, and the act of 1859 (§3684 Burns 1894) rendering tolls uncollectible where turnpike roads are permitted to remain out of repair, does not impose any additional burden, and its provisions are therefore binding on such company. *pp. 568-570.*

TURNPIKES AND TOLL ROADS.—Action for Toll.—Instructions.—In an action by a turnpike company to recover tolls, to which the defendant pleaded as a bar to recovery, under §3684 Burns 1894, that the road was out of repair, it was proper for the court to inform the jury by proper instruction what constituted condition of repair or want of repair; whether such condition existed or not having been submitted to the jury in other instructions. It was also proper to instruct the jury that if, at any time, any one or more of the trips

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for which recovery was sought were taken, the road was in good repair, they should find for the plaintiff for the amount charged for such trip or trips. *p. 571.*

TRIAL.—Misconduct of Jury.—New Trial.—A new trial will not be granted on account of misconduct of jurors, unless it be made to appear affirmatively that the party complaining had no knowledge of such misconduct before the jury retired to consider their verdict. *p. 572.*

From the Dearborn Circuit Court. *Affirmed.*

H. D. McMullen, H. R. McMullen, C. W. McMullen,
and *W. R. Johnston*, for appellant.

COMSTOCK, J.—The appellant was incorporated by a special act of the General Assembly of this State, approved February 15, 1848, Local Laws of Indiana 1848, p. 229. By section 26 of said act, it is declared to be a public act.

This action was commenced before a justice of the peace of Dearborn county, to recover tolls amounting to \$51.31. A trial resulted in a judgment in favor of the appellees. Upon appeal to the Dearborn Circuit Court, the trial again resulted in a judgment in favor of appellees. From this judgment the turnpike company appeals. Before the trial began in the circuit court, the appellees, defendants below, withdrew all their pleadings except the amended third paragraph of answer. Two errors are assigned: (1) Overruling the demurrer to the amended third paragraph of answer, and (2) overruling the motion for a new trial.

The amended third paragraph of answer alleges, in substance, that the turnpike in question was constructed upon an existing highway; and that at and prior to the accruing of the tolls sued for, the turnpike had become and remained out of repair for more than a reasonable length of time. The question presented by the demurrer to this answer and by the first assigned error is this: The plaintiff having been incorporated by special act of the General Assembly, and having built its road by virtue of and pursuant to the act of incorporation, does §3684 R. S. 1881, §4812 Burns 1894, apply in an action by this company to collect tolls?

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This action having been commenced before a justice of the peace, the facts alleged in the paragraph of answer if material could have been proved without any plea. But the same question is presented by reason seven and one-half for a new trial, being the admission of the testimony of the witness, Gear, that the turnpike was out of repair; and the giving of instructions numbered three, five, six, seven, eight, nine, and ten by the court of its own motion, the admission of which testimony and the giving of each of which instructions was upon the theory that §3684, *supra*, applied to the appellant corporation.

Twenty-four reasons are assigned in the motion for a new trial. We will consider only such as are discussed. The seventh and eighth reasons for a new trial are based upon the refusal of the court to permit appellant (plaintiff below) to prove by its secretary the expenditure for repairs on the road during the years 1889 to 1898, inclusive, of the sum of \$15,588.96, and the amount expended for repairs for each of said years. Upon the part of the appellee testimony was introduced to show that the road was out of repair August 5, 1898, and for several years prior thereto. Evidence was introduced by appellant of repairs of the entire road during the year referred to. It would not have been error to have permitted evidence of the amount so expended, but as appellant introduced evidence to show the actual condition of the road at the time in issue, it was not harmed by this ruling of the court. In support of reason seven and one-half for a new trial and the giving of the foregoing instructions, the learned counsel for appellant argue (we have not been favored with a brief by appellee) that the charter of the corporation constitutes a contract between the corporation and the State, and secures rights in the franchise which can not be diminished by subsequent legislation; that section seventeen of the act of incorporation authorized the company to collect tolls of all persons using said road; that statutes are to be prospective in their application un-

less a contrary intention is clearly expressed and not then if such construction would divest vested rights. That the imposition of new and additional burdens is to divest vested rights. These general propositions are supported by the authorities. In our opinion, they are not conclusive of the question under consideration. In accepting the charter, the company impliedly agrees to maintain the road in good repair. The statute provided this one method of inducing the company to perform its implied obligation. It imposed no additional burden. Such a corporation furnishes to the State a cause for the forfeiture of its charter when it suffers its road to become and remain out of repair. Angell & Ames on Corp. §776.

In Elliott's Roads & Streets, at page 73, the learned author says: "The general rule is that corporate rights can only be forfeited by a judicial judgment, and there is no reason why this rule should not apply to turnpike corporations; if it does, then it must follow that in a collateral action, such as one to collect toll, the defendant can not aver that the charter has been forfeited. An apparent exception to this rule exists where the statute expressly declares what shall constitute a forfeiture, and invests citizens with the right to insist upon it as against a corporation asserting a cause of action against them. But this exception is apparent, rather than actual, for the right given the citizen in such cases is to defeat the exercise of a franchise in a particular instance and not to destroy the corporate existence. It is often provided that a right to exact toll shall be forfeited if the road is suffered to get out of repair, and a person sued for toll may undoubtedly show that by suffering the road to get out of repair the turnpike company has lost its right to collect toll. It is competent for the legislature to provide what acts shall constitute an abandonment of a turnpike, and when the thing happens which the statute expressly and explicitly declares shall be deemed to constitute an abandonment, the right to collect toll is lost."

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Instructions twelve, thirteen and fourteen given at the request of the appellee are complained of because, as claimed, they called upon the jury to construe the statute. This claim is not well founded, because the court in previous instructions clearly explained to the jury and construed the provisions of the statute. In the charges complained of, reference is made to the provisions of the statute but not in any way calculated to mislead the jury. The further objection is made to said instruction twelve upon the ground that it is contradictory of instruction numbered ten, given by the court of its own motion. The objection, with due deference to counsel for appellant, is not well founded.

Objection is also made to the fifteenth instruction given at the request of appellees. It is as follows: "If you find that there were places in plaintiff's turnpike at which the metal had been worn off down to the clay beneath, so that in wet weather such places became muddy, then you would be justified in finding that such places were out of repair within the meaning of the law, even though such places in the dry season should by reason of the weather and driving thereover become hard and smooth so as not to inconvenience the public travel." It is urged that the court in this instruction tells the jury the meaning of the words "out of repair." Counsel argue that if the road is at any time and for any cause hard and smooth "so as not to inconvenience public travel, then it is not at such time out of repair, and that under the statute to exempt a person from liability for toll by reason of the road being out of repair, it must be out of repair at the time it is used." It was proper for the court to inform the jury what constituted condition of repair or want of repair; whether such condition existed or not was a question submitted to the jury in other instructions. In another instruction the jury were told that if at the time any one or more of the trips for which appellant sought to recover toll were taken the road was in good repair, they should find for the plaintiff for the amount charged for such

trip or trips. The instructions considered together were not misleading or contradictory, and correctly informed the jury as to the law.

Appellant complains of the refusal of the court to give certain instructions requested. So far as they stated the law, they were substantially covered by the instructions given.

The twenty-fourth and last reason for a new trial discussed is based upon the misconduct of the jury. After the evidence had been closed, the jury was sent by the court in charge of the sheriff to view the road, being first properly charged by the court. Affidavits filed in support of the motion show that while the jury was so viewing the road, measurements were made by two members of the jury in the presence of other jurors, of ruts, gutters, etc., and the width and depth thereof ascertained by such measurements. That said measurements were made at the points on said road where the condition of the road and the width and depth of these same gutters were in controversy, and about which the witnesses on both sides testified and about which there was a conflict in the testimony. It is claimed that the minds of the jury were thus unduly influenced. In opposition to the motion, the affidavits of these jurymen were filed in which each of them made oath that he made the measurements on the 2nd day of November, 1898; that in making said measurements he knew that the then condition of the turnpike was not to be considered by him in arriving at a verdict, "because he knew that the evidence in said action all of which had been heard by affiant had been limited to the condition of said turnpike on the 1st day of August, 1898, and prior thereto, and said measurements were made largely from curiosity, and the results of said measurements and the knowledge obtained thereby of the condition of said turnpike on said 2nd day of November, did not in any manner influence him in arriving at a verdict in said cause; but that he formed his judgment as a juror

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in said action solely from the evidence introduced in said cause, and not otherwise.”

It appears from the record that the introduction of the evidence in the cause was concluded on November 1, 1898, at which time the jury were permitted to separate under proper instructions until November 3, 1898, at 8:30 o'clock a. m., at which time they were to hear the arguments of counsel and charges of the court. The alleged misconduct occurred November 2, 1898. It does not appear from the record that appellant or its counsel did not know of the alleged misconduct before the jury retired to consider its verdict. In the absence of such showing a new trial can not be granted. *Bank v. Cooper*, 19 Ind. App. 13; *Thompson & Merriam on Juries*, §456; *Thornton on Juries and Inst.*, §436; *Cluck v. State*, 40 Ind. 263; *Henning v. State*, 106 Ind. 386; *Long v. State*, 95 Ind. 481. We need not therefore further consider this reason for a new trial. An examination of the record shows that the merits of the cause have been fairly tried and determined.

Judgment affirmed.

VESTAL ET AL. v. CRAIG.

[No. 8,226. Filed November 27, 1900.]

LANDLORD AND TENANT.—*Contracts.*—*Assignment.*—*Rents.*—*Complaint.*—A complaint alleged that defendants executed a contract wherein it was agreed that they should not remove their stock of goods until the rent then due and to become due should be paid, and that the stock should stand good for the rent, and that such contract was duly assigned to plaintiff; that defendants failed to comply with said contract in that the stock of goods was removed without the knowledge or consent of plaintiff and disposed of and delivered up to the purchaser, and refused to pay the rent, or apply the proceeds of the sales thereon. *Held*, that the complaint was indefinite, and was insufficient as based on an action for breach of contract, or for rent. pp. 574, 575.

APPEAL AND ERROR.—*Harmless Error.*—The rule that error in overruling a demurrer to a complaint is cured by special finding of facts and conclusions of law thereon, is based upon the premise that a right result was reached. p. 576.

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From the Hamilton Circuit Court. *Reversed.*

J. A. Roberts, S. D. Stuart and C. G. Reagan, for appellants.

H. J. Alexander, T. P. Davis, F. E. Gavin and J. L. Gavin, for appellee.

COMSTOCK, J.—Appellee was plaintiff below. The complaint alleges: “That the defendants on the 23rd day of August, 1897, in the name and style of G. W. Vestal, A. H. Lacy and Meade Vestal, respectively, executed to M. S. and Kate J. Lebo their certain contract and agreement, as follows, to wit: ‘M. S. and Kate Lebo. I hereby agree that my stock of goods now in your room shall not be removed from where now located until the rent therefor now due and to become due shall be paid, both the rent while closed up and while open, and that said stock shall stand good for the same. Aug. 23rd, 1897. G. W. Vestal. A. H. Lacy. Meade Vestal.’ That thereafter, to wit: on the — day of November, 1897, said Lebos for value received assigned said contract in writing to plaintiff by indorsement thereon as follows, to wit: ‘For value received we hereby assign to Will H. Craig our interest in the above contract to the following amounts and items: 1st, the back rent due while the store was closed, \$73.45; 2nd, also rent on room from Nov. 1, ’97 to March 1, ’98, 4 mo., \$72,—total \$145.45. We also agree that if said storeroom should become vacant before March 1, 1898, we will be liable to said Craig and agree to pay him the amount of rent that accrues during said vacancy. M. S. Lebo. Kate J. Lebo.’ That said defendants have failed and refused to comply with said contract in this to wit: That the said stock of goods has been removed from where located without the knowledge or consent of plaintiff and said defendants have failed and refused to pay said rent; that said defendants have sold and disposed of said stock of goods and delivered up to the purchaser complete possession thereof and have failed and re-

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fused to pay said rent or apply the proceeds of said sale thereon. That there is now due and owing to plaintiff under and by virtue of said contract the sum of \$150, and that the above conditions were broken since March 1, 1898, and said sum due on said date. Wherefore plaintiff demands judgment against defendants in the sum of \$150 and for all other proper relief." The court made a special finding of facts and stated conclusions of law and rendered judgment thereon in favor of appellee for \$125.50.

The errors assigned question (1) the sufficiency of the complaint, and (2) the correctness of the conclusions of law stated upon the special finding of facts.

It is urged that the demurrers to the complaint should have been sustained because it does not appear upon what theory it is drawn. A pleading must proceed upon a definite theory and be good upon that theory. Each theory must be embodied in a separate paragraph and only one theory can be pleaded in a single paragraph. The court must determine the theory from the leading allegations of the pleading. *Cleveland, etc., R. Co. v. Dugan*, 18 Ind. App. 435, and authorities there cited.

The complaint before us is in one paragraph. Upon reading it, one is left in doubt as to whether it is an action for rent or for damages for the breach of the contract set up in the complaint by the removal and sale of the goods which were "to stand good for the rent." The contract set out contains no promise to pay rent; it does not show with whom the contract for rent was made, nor from whom it was due. Nor does the complaint allege that the appellants or either of them promised to pay rent. The complaint is not sufficient upon the theory that the action is for rent. If the action is for a breach of a contract giving a lien on the goods, the complaint by the averment of facts should show that the lien has been lost. Without deciding whether the contract gave a lien, we deem it only necessary to say that it does not aver facts showing that a lien was lost. The sale of the

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goods and the removal from the particular room in question would not necessarily divest appellee of any lien he may have had. The complaint is not good upon either theory.

The learned counsel for appellee do not discuss the sufficiency of the complaint, but rest this question of the appeal upon the proposition that as the court made a special finding and stated conclusions of law thereon, its action in overruling the demurrers to the complaint is not material. A proposition which in its general terms is supported by numerous decisions of the appellate courts of this State. This rule, however, is founded upon the premise that from the special findings of facts, it appears that a right result was reached. As said by Mitchell, J., speaking for the court in *American, etc., Ins. Co. v. Replogle*, 114 Ind. 1, (in which case it was claimed that the trial court had reached a correct result upon the facts specially found): "We are not prepared to say, from all that appears upon the record, that a right result was reached."

Judgment reversed for error in overruling the demurrers to the complaint.

MEEK v. BEAVER.

[No. 8,288. Filed November 27, 1900.]

SALES.—Failure to Comply with Terms of Sale.—Plaintiff bid off growing wheat at a certain price per acre at an administrator's sale. By the terms of the sale a credit was to be given until December the 25th, but the auctioneer announced that the purchaser of the wheat should pay one-half of the bill for a quantity of fertilizer used in the sowing of the wheat. Notes were prepared and delivered to plaintiff for signature covering the amount of the purchase. Plaintiff executed one of the notes with surety and returned them to administrator saying that his surety refused to sign the fertilizer note. The administrator returned the notes to plaintiff and afterwards sought to have the matter settled, but plaintiff stated that the notes were in the hands of his attorney. The clerk of the sale reported the wheat unsold. Plaintiff afterwards paid the fertilizer bill to the fertilizer company. *Held*, that the administrator was warranted in treating the wheat as unsold, and that plaintiff could not recover damages for failure to deliver the wheat.

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From the Fayette Circuit Court. *Affirmed.*

D. W. McKee, J. I. Little and H. L. Frost, for appellant.

Reuben Conner and Lon Conner, for appellee.

BLACK, J.—The appellant was the plaintiff, and he assigns as error the overruling of his motion for a new trial. The appellee was the administratrix of the estate of her deceased husband, and at her public sale of the personal property of the estate on the 3rd of March, 1898, the appellant bid for, and the auctioneer struck off to him, the share of the decedent as landlord in growing wheat on certain land, notice being given at the time of the sale that the land would have to be measured before a note could be executed for the purchase price. By the terms of the sale a credit was to be given until December 25, 1898, on sums over \$5, but the auctioneer announced that the purchaser should pay one-half of a bill for a quantity of fertilizer used in the sowing of the wheat, such one-half being \$22, to be due September 1, 1898, the decedent having given his note to a certain fertilizer company for \$44 for said fertilizer, due at that date. The appellant bid off the wheat at a certain sum per acre. The estate was insolvent, and would pay nothing on the general debts, said note for fertilizer being one of the general debts.

After the land had been measured as so announced, the clerk of the sale made out for the administratrix notes to be executed by the purchasers at the sale and their sureties, among them two notes dated March 3, 1898, to be executed by the appellant and his surety, one for an amount (\$58.63) calculated by multiplying the amount of his bid per acre by the number of acres so ascertained, due December 25, 1898, and one for \$22 due September 1, 1898, each payable to the order of the administratrix. These two notes were sent by the administratrix to the appellant for execution. A few

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days thereafter he called on the administratrix, with the two notes, the one for \$58.63 signed by himself and by his father as his surety. The other note was unsigned, and the appellant stated that his father had declined to sign it as surety, for certain expressed reasons. The appellant went away leaving the two notes at the home of the appellee, where they were found lying upon a bed. There was conflict in the testimony as to whether he left them there or gave them to a member of appellee's family. On the evening of the same day, the appellee and her son took the two notes to the residence of the appellant and left them with his wife, the appellant being absent. Some days later the appellee found the appellant at his home and sought to have the matter settled, but he told her the notes were in the hands of his attorney. Thereafter, on the 27th of April, 1898, the clerk of the sale filed his sale bill in the office of the clerk of the circuit court, setting out the wheat in question as property remaining unsold. Afterward, the appellant paid the sum of \$22, the one-half of the amount of the decedent's note for fertilizer, to the fertilizer company, the holder of the note, and later brought this action against the appellee to recover damages for failure to deliver to him the wheat bid off by him.

It is quite plain from the evidence in the record before us that both parties to the contract understood it to require, as a part of the terms of the sale, that both of the notes above described should be executed by the appellant with surety to the administratrix. This is clearly indicated by the testimony of the appellant himself, which we need not set forth at length. The appellant having failed and refused to perform the terms of the contract of sale on his part, the administratrix was fully warranted in treating the property bid off by him as unsold.

Whatever errors may have occurred in the conduct of the trial, if any, there can be no doubt, upon the showing made in evidence by the appellant, that his demand was without

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any foundation. Upon the merits of the case, the conclusion reached in the trial court was the only proper end to the action.

Judgment affirmed.

THE STATE v. PHILLIPS.

[No. 8,241. Filed November 27, 1900.]

CRIMINAL LAW.—*Appeal by State.*—*Question of Fact.*—A judgment of acquittal will not be reviewed on appeal on an assignment of error that “the court erred in its rulings upon the point of law reserved by the State for the decision of this court, in that it found appellee not guilty upon the agreed statement of facts,” since such assignment presents for review only a question of fact, and not one of law.

From the Kosciusko Circuit Court. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, C. C. *Hadley* and *M. H. Summy*, for State.

L. R. Stookey and *A. F. Biggs*, for appellee.

ROBINSON, J.—Appellee was convicted before a justice of the peace of hunting on the enclosed land of another without written consent, contrary to the provisions of §2220 Burns 1894, §2110 Horner 1897. He appealed to the circuit court and from a judgment of acquittal the State appeals. The error assigned is as follows: “The court erred in its rulings upon the point of law reserved by the State for the decision of this court, in that it found appellee not guilty upon the agreed statement of facts.” Appellee suggests that as no bill of exceptions has been filed, no question of law is properly reserved for decision by this court.

The statute provides that appeals may be taken by the State, upon a judgment for the defendant on quashing or setting aside an indictment or information, upon an order of the court arresting the judgment, or upon a question reserved by the State. §1955 Burns 1894, §1882 Horner 1897. Section 1915 Burns 1894 provides: “The prosecut-

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ing attorney may except to any opinion of the court during the prosecuting of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the Supreme Court upon an appeal at any time within one year."

The case at bar was not an agreed case. There was an agreement as to the facts. The agreed facts constituting the evidence have not been brought into the record, nor has any part of the evidence been brought into the record, by any bill of exceptions. But even if the evidence, or so much as would be necessary to present the question reserved, had been brought up by a bill of exceptions, no question is presented by the assignment of error. The assignment is in effect that the court erred in finding appellee not guilty as charged. The opinion which this court is authorized to pronounce on appeals by the State must be upon matter of law and not of fact. The purpose in allowing appeals by the State where a defendant has been acquitted upon trial is not to correct any error in the particular case, but to furnish a rule for the guidance of trial courts in future cases. The State could not be granted a new trial, nor does the above statute authorize this court to review the facts and pronounce an opinion upon them. Should we in such a case look into the evidence and determine whether there was or was not evidence to sustain a conviction such determination would be binding upon no one nor would it furnish any rule for the guidance of trial courts. The error assigned presents for review only a question of fact, and not of law. See *State v. Campbell*, 67 Ind. 302; *State v. Van Valkenburg*, 60 Ind. 302; *State v. Hall*, 58 Ind. 512; *State v. Rousch*, 60 Ind. 304.

Appeal dismissed.

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THE STATE v. THOMPSON.

[No. 3,254. Filed November 27, 1900.]

CRIMINAL LAW.—*Failure to Pay Dog Tax.—Indictment.*—An indictment, under the act of 1897 (Acts 1897, p. 178), for keeping or harboring a dog without holding a township assessor's or township trustee's receipt showing the required tax has been paid for same as provided in said act, which follows the language of §9 thereof is sufficient.

From the Sullivan Circuit Court. *Reversed.*

W. L. Taylor, Attorney-General, A. E. Dickey, C. D. Hunt, Merrill Moores and C. C. Hadley, for State.

J. S. Bays, for appellee.

HENLEY, C. J.—By §2864i Burns Supp. 1897, it is made a misdemeanor for any person who does not hold a township assessor's or township trustee's receipt, showing the required tax has been paid for the same, as is provided in the act of which this section is a part, to keep, harbor, board or feed, or permit any dog to stay about his, her, or their premises; the penalty being a fine in any sum not exceeding \$10. Under this section of the statute, an indictment was returned against appellee by the grand jury of Sullivan county. The lower court, upon a motion to quash, held the indictment insufficient and appellee was discharged. The State appeals from this ruling of the court.

Section 2864i is one of the sections of an act regulating the taxing of dogs, passed by the legislature in 1897. Acts of 1897, p. 178. Section 2864b of said act is as follows: "The township assessor shall give to each person a receipt for such money paid him, which shall be designated for dog tax, which receipt shall show the person's name who owns, harbors or keeps the dog, the amount paid, and the number, description and kind of dogs paid for, and whether male or female, and the number of each, which receipt shall relieve the person or persons owning, keeping or harboring such

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dogs for the current year, extending one year from its date or until the next regular township assessment. Such township assessor shall keep a record of the person or persons owning dogs and a record of the dogs paid for. And he shall keep a stub record or copy of the receipts given by him for money paid him as dog tax; such stub record shall show the amount paid him, the number of dogs, both male and female, paid for, and the person's name, owning the dogs so paid for. And he shall within five days after the completion of the assessment of his township, each year turn over to the township trustee of his township all the records kept by him relating to the collecting and payment of dog tax, and a copy of all receipts given by him to persons having paid him money as dog tax, and all money received by him as dog tax." In this section it will be noted that it is made the duty of the assessor to give to the owner or keeper of a dog a receipt and this receipt is not only to evidence the amount of money paid, but it must contain the owner's name, must show whether the dog paid for was a male or female, must show what kind of a dog it was, and must contain a description of the dog. It is made the duty of the assessor, amongst other things, to turn over to the township trustee a copy of all receipts given by him to persons having paid him money as dog tax.

By §2864d Burns Supp. 1897, it is provided that "Any person who shall keep or harbor any dog, and shall not have paid the *township assessor* the tax as above specified *and received his receipt*" as therein specified, shall be subject to a fine of not less than \$5 or more than \$20. The owner of a dog is made doubly secure against a prosecution for a failure to pay the tax and hold the receipt, if in fact such tax had been paid by him, because the records of both the assessor and the trustee would furnish him a complete defense. And this receipt which the statute provides for is an identification of the owner by name and of the dog by kind and description. A person who owns, keeps or harbors

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a dog, and has paid the tax and received the receipt as the law provides, is the holder of the receipt. The fact that he may have lost or misplaced his receipt could make no difference, nor could it subject him to a prosecution under any section of this act.

By §2864e Burns Supp. 1897, it is provided that if any person shall acquire, keep or harbor a dog after the assessor shall have completed his assessment, he shall pay to the township trustee of his township the amount of tax provided in said act, and shall receive the receipt of the township trustee for the same. Thus by section 2864d Burns Supp. 1897 it is made a misdemeanor to fail to pay the township assessor and receive his receipt, and by §2864i, it is made a misdemeanor for any person to fail to hold either the receipt of the township assessor or the receipt of the township trustee showing that the tax has been paid. The indictment is in the language of the statute. It will not be contended that the terms of the statute under which this indictment is brought are broader than the intent of the legislature. *Skinner v. State*, 120 Ind. 127; *Howell v. State*, 4 Ind. App. 148.

There is no room for the construction of this section of the statute other than to give to the words employed their plain and ordinary meaning. If a person has paid to the assessor, or to the township trustee, the tax provided for in the act, and received a receipt therefor, he is the holder of the receipt. The statute imposes no hardship upon any one. We think the indictment properly charges an offense under §2864i Burns Supp. 1897.

The appeal of the State is sustained.

Gaskins v. Runkle.

GASKINS v. RUNKLE.

[No. 8,264. Filed November 27, 1900.]

DAMAGES.—*Nervous Prostration.—Fright.*—An action can not be maintained for damages on account of nervous prostration resulting from fright caused by defendant entering upon the premises of plaintiff's husband and quarreling with him, within hearing of plaintiff, after being ordered away, knowing plaintiff was in delicate health and easily excited.

From the Sullivan Circuit Court. *Affirmed.*

J. T. Hays, for appellant.

J. S. Bays, for appellee.

WILEY, J.—Appellant was plaintiff below. Her complaint was in a single paragraph, to which a demurrer for want of facts was sustained. She refused to plead further and suffered judgment to be rendered against her for costs. The complaint avers that appellant was a married woman living with her husband on a farm; that on July 14, 1898, she gave birth to a child; that prior to and on July 26, 1898, appellee knew that she had recently been confined and knew her physical condition; that on July 26th, she had so far recovered as to be able to be up; that she was convalescent but unable to stand any excitement or mental strain or nervous shock; that on said July 26th, the appellee went to appellant's and upon the lands of appellant's husband, and quarreled with her said husband; that he refused to leave said premises when so notified to do, "but unlawfully remained and refused to depart from plaintiff's home and from the lands of plaintiff's husband * * * when so notified to depart therefrom, and there in a rude and insolent manner, wilfully and purposely remained and quarreled with plaintiff's husband, knowing that plaintiff was home and within hearing of said quarrel, and well knew that said quarrel, as well as his refusal to leave plaintiff's home would greatly excite the plaintiff and cause a nervous

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shock and pain, suffering, and mental anguish to her great personal injury and suffering; and then and there defendant wilfully and greatly provoked the plaintiff's husband; and persistently refusing to depart from plaintiff's home and from the land of plaintiff's husband but quarreled with plaintiff's husband and in a rude and insolent and angry manner wilfully used abusive language to plaintiff's husband, which he knew would excite plaintiff and cause her great pain, suffering, mental anguish hereinafter alleged, thereby causing plaintiff's husband to get a revolver to compel him the defendant to depart from the plaintiff's home and from the lands of plaintiff's husband, etc. The complaint then avers that defendant was a large man, was quarrelsome, was at enmity with appellant's husband, who was a small man, and that both appellant and appellee knew said facts. The complaint then contains the following allegations: "The defendant's unlawful and wilful conduct as aforesaid, all of which defendant well knew it would do, caused plaintiff to become greatly frightened and excited and did greatly frighten and excite her, as defendant knew it would do, and so badly frightened her as to cause a great nervous and mental shock, as defendant knew it would do; and so frightened the plaintiff and shocked her nerves as to throw her into a state of unconsciousness, etc." The complaint describes the evil consequences which resulted to her, and avers the injuries thus received were produced without her fault, etc.

Appellee has not filed any brief. The complaint gathered from its various allegations proceeds upon the theory, if we rightly construe it, that the acts of appellee were wrongful, and that such wrongful acts greatly frightened and excited appellant, so that she was nervously shocked, and thereby sustained injury. Appellant's counsel has called our attention to but one case in support of his contention that the complaint states a cause of action, viz.: *Newell v. Witcher*, 53 Vt. 589. That was a case where

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married man broke into the bedroom at night of a blind girl, in his employ as a music teacher, in his own household to solicit and have sexual intercourse with her. In the trial of the case, the court instructed the jury that if the plaintiff was so frightened and shocked in her feelings as to injure her health by defendant's conduct, she could recover damages for such injury. On appeal the supreme court of Vermont upheld the instruction, and in so doing said: "When the acts of the party complained of are of themselves innocent and harmless, and may become wrongful by the manner in which they are done, then a man is to be judged by the common and ordinary effect of such acts. But when a married man breaks into the bedroom of a chaste and honest woman at midnight, and proposes to her sexual and criminal commerce with her, the act is wholly wrongful; the aim and purpose is wrongful, and the act if perpetrated is criminal; and the party offending must answer in damages for all actual injuries." If we accept this expression of the supreme court of Vermont as a correct statement of the law as applicable to the facts in that case, we are unable to see how the rule there announced is applicable to the case before us as stated in the complaint. In that case, the assault was made upon, and the acts of the defendant were directed to the injured party. No such a condition exists here. Counsel seeks to uphold the complaint upon the sole ground that the acts of the appellee were unlawful, in that he was unlawfully upon the lands of appellant's husband; that he was notified to depart therefrom, and when so notified, neglected to depart. We are cited to §2010 Burns 1894, to show that such refusal to depart, when notified to do so, was a misdemeanor, and hence unlawful. We concede this to be the law, but it does not necessarily follow that, because he was upon the premises of appellant's husband, and his acts while there excited and frightened her, to her injury, he can be required to respond in damages. There is no allegation that appellee

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intended by his unlawful acts to inflict any injury upon the appellant.

We had occasion in the recent case of *Cleveland, etc., R. Co. v. Stewart*, 24 Ind. App. 374, to discuss the question of liability for fright growing out of the wrongful and negligent acts to a third party of the party occasioning such fright, and reached the conclusion that the action could not be maintained. In that case, the appellee, with her husband and two daughters, attempted to take passage on one of appellant's trains. One of appellee's daughters had taken hold of the hand-rail of the car and was in the act of getting on when the train started. She held to the hand-rail and was dragged a short distance along the platform. Appellee was on the platform and witnessed the danger to which her daughter was exposed. She was in feeble health and became greatly frightened, resulting in nervous prostration, etc. She sued the appellant to recover damages resulting from such fright. It was held she could not recover. In that case many authorities were cited, and from which copious excerpts were quoted. The same principles and rules of law as announced in that case are of controlling influence here.

That appellee was guilty of a wrong there can be no doubt, but as was said in *Kalen v. Terre Haute, etc., R. Co.*, 18 Ind. App. 202, 63 Am. St. 343, Black, J., speaking for the court: "But not every injurious effect of wrong can form the basis of damages. Many ill consequences follow from wrongs as proximate effects for which the law can not afford redress, because of the inadequacy of the methods and means of courts to reach just and adequate results with sufficient certainty. * * * It would seem that such injuries are among those which courts can not remedy by means of any practicable methods at their command which can be applied generally so as to secure justice to both the plaintiffs and defendants and so as best subserve the interests of the community, whose instruments the courts are in

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the administration of justice. Such claims for redress seem to be outside the wise policy of the law."

In the case of *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453, the court said: "A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he had been placed in a perilous position. Nor is mere fright the subject of damages. Fright must be accompanied by some actual injury caused thereby, and traceable directly thereto, to be the subject of damages. Mere fright unaccompanied by any injury resulting therefrom, can not be the subject of damages." See also *Jock v. Dankwardt*, 85 Ill. 331.

The law as declared in *Cleveland, etc., R. Co. v. Stewart*, *supra*, is decisive of the case now before us, and further discussion would be useless. The court correctly sustained the demurrer to the complaint.

Judgment affirmed.

THE AMERICAN TIN-PLATE COMPANY v. GUY.

[No. 3,285. Filed November 27, 1900.]

APPEAL.—Joint Assignment of Error.—A joint assignment of error as to the sufficiency of a complaint is not available if either paragraph thereof is good. *p. 590.*

DAMAGES.—Master and Servant.—Agreement to Furnish Medical Treatment.—Where a corporation deducts a portion of its employe's wages for the purpose of employing a physician under an agreement to furnish and provide competent medical and surgical services to the employe and his family, the corporation is liable in damages to the employe for the death of his child caused by the negligent failure of the corporation to perform its part of the contract. *pp. 590, 591.*

VERDICT.—Answers to Interrogatories.—A general verdict is a finding that all the facts necessary to establish the cause of action are true, and in no case is the party in whose favor the verdict is returned required to establish any part of his case by answers to interrogatories. *p. 591.*

From the Madison Superior Court. *Affirmed.*

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B. R. Call and *C. M. Greenlee*, for appellant.

H. C. Austill, *H. F. Wilkie*, *C. K. Bagot*, *Thomas Bagot* and *Alfred Ellison*, for appellee.

HENLEY, C. J.—This action was commenced by one of the appellant's employes. Appellant is a corporation employing a large number of men, and is engaged in the manufacture of tin-plate at Elwood, Indiana. By the terms of the contract under which appellee was employed, it was agreed that \$1 per month should be deducted from the wages paid appellee, for which sum appellant agreed to furnish and provide competent medical and surgical services to the appellee and his family, doing and performing such services and treatment as the occasion for it might arise during the life of the contract, which was to be continued in force as long as appellee remained a servant of the appellant. Appellant to comply with its part of the contract and for the purpose of furnishing the medical and surgical treatment in said contract provided for kept in its regular employ a physician and surgeon who was authorized to employ necessary assistants and to do the work for appellant's employes whenever such work became necessary. Appellee was a married man with a wife and child, the child being a little more than four years old. The child was injured by a burn or scald on the leg. The burn was about two by four and one-half inches in size. Appellee requested appellant and its regularly appointed physician and surgeon to give to his said child the medical treatment which its injury needed, and to which he and the child were entitled by reason of the contract with the appellant. That said physician and surgeon although immediately notified did not visit said child for more than twenty-six hours after being notified, and failed and refused to give said child the attention which its injuries required, and negligently and carelessly treated said child. Appellant failed and refused to comply with its part of the contract and did not furnish and provide for appellee's child such services or treatment as it

should have had, nor did appellant require of its physicians and surgeons that they visit said child and give it the necessary treatment and attention. Appellee relied upon his contract with the appellant and upon the promises of appellant's physicians and surgeons, and he was unable to procure treatment by other physicians and surgeons, and, by reason of the carelessness and negligence of the appellant in this regard, the child died.

There were two paragraphs of the complaint. Demurrers for want of sufficient facts were overruled to each paragraph. Appellant answered by general denial. The cause was submitted to a jury for trial and a verdict returned in the sum of \$141.50. With the general verdict the jury returned answers to interrogatories submitted by appellant. The court rendered judgment in favor of appellee for the amount of the verdict, and overruled appellant's motion for judgment upon the facts found by way of answers to interrogatories. The assignment of errors presents two questions to this court: (1) That the complaint was insufficient to withstand a demurrer for want of facts, and (2) that the court erred in overruling appellant's motion for judgment on the facts found by the answers to interrogatories.

The assignment which goes to the sufficiency of the complaint is a joint assignment, and it follows that if either paragraph of the complaint is good, the assault must fail. *Gilmore v. Ward*, 22 Ind. App. 106. We have heretofore stated the facts upon which appellee bases his cause of action. Each paragraph of the complaint avers that appellee was free from contributory negligence, and that the death of his said child resulted wholly from the negligence of appellant and its physicians and surgeons. We think that the Supreme Court of this State in the case of *Wabash R. Co. v. Kelley*, 153 Ind. 119, decided every question raised by appellant which in any manner affects the sufficiency of the complaint in this case. Appellee had the right to rely upon his contract, and if he was injured by the negligent

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failure of appellant to perform its part of the contract, then appellant must be responsible in damages.

In *Wabash R. Co. v. Kelley, supra*, it is held that a railway company is liable to an employe for malpractice of its hospital surgeon when the company has deducted a part of its employe's wages for the maintenance of such hospital. In *Pittsburgh, etc., R. Co. v. Sullivan*, 141 Ind. 83, 27 L. R. A. 840, it is held that a corporation is liable for the acts of its agents performed while engaged in the discharge of duties within the general scope of the agency, although the particular act was wilful and not directly authorized, and although in doing such act the agent failed in his duty to his principal and disobeyed the instructions given him. The facts presented by the complaint are much stronger in the case at bar than those presented by the evidence in the case of *Wabash R. Co. v. Kelly, supra*. The averments of the complaint are direct and sufficient as to the negligence of appellant and equally so is the averment that appellee in nowise contributed to the injury received by him in the death of his little child.

The next question presented arises upon the ruling of the court in overruling appellant's motion for judgment upon the facts specially found. Facts found by way of answers to interrogatories are not used to establish or support a material averment of a pleading presented by a party in whose favor a general verdict has been returned. A general verdict is a finding that all the facts necessary to establish the cause of action are true. The facts found specially may tend to support the general verdict, they may be contradictory and thus destroy their effect altogether, or they may clearly show that the prevailing party has failed to establish, by the evidence, some fact material to the cause of action. In no case is the party in whose favor a general verdict has been returned required to establish any part of his case by answers to interrogatories. The general verdict performs this duty for him.

Elliott v. Brazil Block Coal Co.

In this case, when we consider only those facts which the jury had a right to find by answers to proper interrogatories, we find nothing in irreconcilable conflict with the general verdict. No part of appellee's cause of action, as stated in his complaint, is overthrown.

We find no error.

ELLIOTT ET AL. v. THE BRAZIL BLOCK COAL COMPANY.

[No. 8,286. Filed November 27, 1900.]

ACTION.—Limitation.—Death by Wrongful Act.—Statutes In Pari Materia.—All statutes of the State on the subject of death by wrongful act are *in pari materia*, and must be construed together, and when so construed the provision of §285 Burns 1894 limiting the time within which an action may be brought for death by wrongful act to two years applies to §7473 Burns 1894, known as the coal mining act. *pp. 593-596.*

LIMITATION OF ACTIONS.—Death by Wrongful Act.—Infants.—The provisions of §285 Burns 1894 limiting the time within which an action may be brought for death by wrongful act to two years applies to infants as well as to adults. *pp. 596, 597.*

From the Clay Circuit Court. *Affirmed.*

Albert Payne and *S. D. Coffey*, for appellants.

G. A. Knight, for appellee.

HENLEY, C. J.—The only question presented by the record in this case arises upon the ruling of the lower court in sustaining appellee's demurrer to the several paragraphs of appellants' complaint. The complaint is in three paragraphs and in each paragraph it is alleged that the appellants are the children and only heirs at law of John W. Elliott, who lost his life on the 12th day of January, 1895, in a coal mine owned by appellee. John W. Elliott was a servant of appellee, and his death was caused through the negligent acts of appellee. Appellants were all minors at the time of the death of their father and but one had obtained his majority on the 18th day of May, 1898, the time of the filing of the complaint.

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The three paragraphs of complaint are literal copies of the three paragraphs of complaint in the case of *Boyd, Adm., v. Brazil Block Coal Co., ante*, 157. The only question decided by the court in that case was that under §7473 Burns 1894 the administrator of the decedent was not the proper party to prosecute an action for death caused by wrongful act growing out of a violation of the mining act. The court held in that case that the action was not in the personal representative of the decedent, but in the persons named in the act. This question has since been passed upon by the Supreme Court. See *Maule Coal Co. v. Partenheimer*, 155 Ind. 100. It is contended in the case at bar that this action having been commenced more than three years after the cause of action accrued, it is controlled by §285 Burns 1894, as to the time within which the action must be brought; that §7473 Burns 1894, being a later enactment upon the same subject changes the general statute only in respect to the persons who may maintain the action, and that in all other respects the provisions of §285, *supra*, are in full force. By §285, *supra*, the time within which an action may be brought under said statute is limited to two years. The right to maintain an action for the death of a human being is purely statutory. Such a right did not exist at common law. *Indianapolis, etc., R. Co. v. Keeley*, 23 Ind. 133; *Jackson v. Pittsburgh, etc., R. Co.*, 140 Ind. 241, 40 Am. St. 192.

We will now proceed to examine the laws enacted in this State on the subject of death by wrongful act. If these various acts upon the same subject are to be construed *in pari materia* then the provision of the general act (§285) as to the limitation of the action applies to all, and each paragraph of complaint in the case is bad, because it shows upon its face that more than three years had elapsed from the time the cause of action accrued to the time the action was commenced. By §285, *supra*, the right of

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action for death caused by wrongful act was first created. That section is as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The next enactment upon this subject is §267 Burns 1894, which gives a right of action for the death of a child to the father or mother or guardian. It is provided in this section as follows: "A father (or in the case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

The next enactment upon the subject is §5310 Burns 1894. This section is a part of an act requiring railroad companies to give certain signals upon the approach of a locomotive to a crossing of a turnpike or other highway. By §5310, it is provided as follows: "The amount of damages which may be recovered under the provisions of this act, whether for bodily injury or death, shall be within the discretion of the court or jury trying the cause: *Provided*, that in case of death such damages shall not exceed the sum of \$5,000."

We come then to the statute known as the coal mining act, under which this action was brought. It is provided by §7473 Burns 1894, as follows: "That for any injury to person or persons or property occasioned by any violation of this act, or any wilful failure to comply with

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any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action shall accrue to widow, children, or adopted children, or the parents or parent, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for like recovery for damages for the injury sustained by reason of such loss of life or lives." It is a settled rule of law that all statutes *in pari materia* must be construed together. *State v. Gerhardt*, 145 Ind. 439; *Wasson v. Bank*, 107 Ind. 206; *Jeffersonville, etc., R. Co. v. Dunlap*, 112 Ind. 93; *Berry v. Louisville, etc., R. Co.*, 128 Ind. 484; *Thornburgh v. American Strawboard Co.*, 141 Ind. 443, 50 Am. St. 334; *Shea v. City of Muncie*, 148 Ind. 14; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Robertson v. State*, 109 Ind. 79; *City of Madison v. Smith*, 83 Ind. 502; *City of Cincinnati v. Holmes*, 56 Ohio St. 104, 46 N. E. 514; *Steel v. Lineberger*, 72 Pa. St. 239; *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16.

In *Thornburgh v. American Strawboard Co.*, *supra*, it is held that §§267, 285, Burns 1894, must be construed together. Monks, J., speaking for the court, said: "It is also settled that §267 and §285 Burns 1894, are to be construed together, the first named section being applicable to cases of minors and the latter to those of adults, and minors whose father and mother have relinquished their right respectively to the services of the child by emancipation or otherwise. *Berry v. Louisville, etc., R. Co.*, 128 Ind. 484, and cases cited." In *State v. Gerhardt*, *supra*, the court say: "All statutes *in pari materia* are to be construed together. *Earl of Ailesbury v. Patterson*, 1 Doug. 28. The legislature is presumed to have had former statutes before it, and to have been acquainted with their judicial construction, and passed new statutes on the same subject with reference thereto. *Steel v. Lineberger*, 72 Pa. St. 239.

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When a number of statutes, whenever passed, relate to the same thing or general subject-matter, they are to be construed together and are *in pari materia*." In *Humphries v. Davis, supra*, the court said: "A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted." In *City of Cincinnati v. Holmes, supra*, it is said: "It is a rule constantly observed in the construction of statutes that where the general provisions of a statute conflict with the more specific provisions of another, or are incompatible with its provisions, the latter is to be read as an exception to the former."

We think it unnecessary to quote further from the large number of authorities upon this subject. The rule of construction is seemingly settled without appealing to the weight of authority. There is no conflict. Applying the rule to this case, we find §285 Burns 1894, the general statute abrogating the common law rule, and giving a right of action for death by wrongful act, specifying the person who shall bring the action, the maximum amount of recovery, and limiting the time in which the action can be commenced to two years. Then we have §267 Burns 1894, giving the right to bring the action for the death of a minor. Then §5310 Burns 1894, which changes the general act only so far as it relates to the amount of recovery. Then §7473 Burns 1894, which changes or modifies the general act only so far as it applies to the persons who may bring the action.

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The condition limiting the right to bring the action to two years remains unimpaired by any of the later enactments, and infants, as well as adults, are bound by it.

In *Demoss v. Newton*, 31 Ind. 219, the court held that when a right springs not from the contract but from legislative enactment, the action to enforce a claim under such enactment may be limited by law, and the legislature is the exclusive judge of the reasonableness of the time allowed within which action may be brought. No exception can be claimed in favor of minors, unless they are expressly mentioned by the statute as excepted.

So in this case the action being purely statutory, it must be brought within the time fixed by the statute, and the infancy of appellants can make no exception. See, *Hanna v. Jeffersonville, etc., R. Co.*, 32 Ind. 113; *Foster v. Yazoo, etc., R. Co.*, 72 Miss. 886, 18 South. 380; *Finnell v. Southern Kansas R. Co.*, 33 Fed. 427; *Taylor v. Cranberry, etc., Co.*, 94 N. C. 525; 8 Am. & Eng. Ency. of Law (2nd ed.), p. 875; *Murphy v. Chicago, etc., R. Co.*, 80 Iowa 26, 45 N. W. 392.

We find no error. Judgment affirmed.

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[No. 8,846. Filed November 27, 1900.]

TRIAL.—Witnesses.—Cross-Examination.—The extent to which the cross-examination of a witness may be carried for the purpose of determining his credibility is within the discretion of the court, and a cause will not be reversed for such reason unless an abuse of discretion is shown. pp. 598, 599.

SAME.—Criminal Law.—Character Witness.—The character a defendant is permitted to introduce in evidence in the trial of a criminal charge is the character involved in the charge. p. 599.

SAME.—Criminal Law.—Evidence.—Intoxicating Liquors.—Where, in a prosecution for selling intoxicating liquors on Sunday in violation of law, a witness testified that defendant's character as a saloon-keeper was good, there was no error in permitting the witness to be asked on cross-examination whether he had ever heard about defendant running gambling in connection with the saloon. pp. 599, 600.

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TRIAL.—Criminal Law.—Character Witness.—Where, in a criminal prosecution, a witness, who had testified to defendant's good character, said on cross-examination that he had never heard any one speak about his character, it was proper to permit such questions to be asked as would disclose the facts on which the witness based his answer. *p. 600.*

INTOXICATING LIQUORS.—Illegal Sales.—Prosecution.—Evidence.—A judgment convicting defendant of the charge of selling intoxicating liquors in violation of law will not be reversed because the judgment was based on the evidence of two witnesses who were employed to obtain evidence of violation of law and purchased the liquor constituting the illegal sale, since the act of purchasing the liquor was no legal wrong, and it was for the jury to determine the truth of the testimony. *pp. 600, 601.*

CRIMINAL LAW.—Evidence.—Trial.—In a prosecution for selling liquor in violation of law the court erred in requiring defendant, who voluntarily became a witness in his own behalf, to answer questions on cross-examination which might expose him to criminal prosecution. *pp. 601, 602.*

From the Fayette Circuit Court. *Reversed.*

D. W. McKee, J. I. Little and H. L. Frost, for appellant.
Reuben Conner and Lon Conner, for State.

ROBINSON, J.—Appellant was convicted of an unlawful sale of intoxicating liquor on Sunday. Motion for a new trial overruled. The error assigned and discussed is overruling the motion for a new trial. There was evidence to sustain a conviction, and though the evidence is conflicting we can not weigh it to determine where the preponderance lies.

The prosecuting witnesses Stalker and Newhouse had been employed to discover violations of the liquor law. Upon re-cross-examination Newhouse was asked "You knew you were committing a crime when you came down here on Sunday?" The objection to this question was properly sustained. The witness' conclusion was not material. It is true that on cross-examination facts tending to impair the credibility of a witness by showing his bias, prejudice, motive, or that he is depraved in character may be shown, but the extent to which such cross-examination may be car-

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ried is within the court's discretion, and even if the question in the case at bar was proper cross-examination there was not such an abuse of discretion as to authorize a reversal. *Shields v. State*, 149 Ind. 395; *Houk v. Branson*, 17 Ind. App. 119.

Objections were sustained to questions asked a witness by appellant as to appellant's general moral character, his general character as a law-abiding citizen and his general character for peace and quietude. This was not error. The rule is that the character a defendant is permitted to introduce in evidence is the character involved in the charge. Appellant introduced a number of witnesses who testified that appellant's character as a saloon-keeper was good and that he had the reputation of being a law-abiding saloon-keeper. No reason has been pointed out by appellant's counsel, and we know of none, why a case like that at bar should be an exception to the rule. A witness had testified that appellant's character as a saloon-keeper was good; in effect that as a saloon-keeper he observed the law. There was no error in permitting this witness to be asked upon cross-examination, "You never heard anything said about his running gambling in connection with the saloon?" The question certainly went to the credibility of the witness which was a question for the jury. *McDonel v. State*, 90 Ind. 320; *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94; *Shears v. State*, 147 Ind. 51.

A number of character witnesses of appellant were asked on cross-examination about whether they knew of a slot machine in appellant's saloon. There was no reversible error in permitting these questions to be asked. They were competent upon the question of the witness' credibility, and appellant was entitled, had he asked it, to an instruction that such evidence should be considered by the jury only as affecting the credibility of the character witness.

A character witness testified to appellant's good character as respects conducting a saloon. Upon cross-examina-

tion he testified that he had never heard anyone speak about appellant's character. Among other questions asked the witness on cross-examination was, "You have seen a slot machine in his room?" Although the witness said he had never heard anyone say anything about appellant's character, yet he testifies his character was good. There was certainly, under such circumstances, no abuse of the court's discretion in permitting a cross-examination which would disclose the basis upon which the witness rested his answer. If in his saloon appellant permitted gambling and slot machines it was proper to ask a witness who had testified as to character, whether the witness knew of the existence of these conditions.

That the verdict is not sustained by sufficient evidence and is contrary to law, and the giving of a certain instruction, are discussed together. It is insisted that there is no legal evidence of guilt; that the two prosecuting witnesses were employed at so much per diem and expenses to obtain evidence of violation of the law; that as such they represented the State and that to permit this conviction to stand is to permit the State to take advantage of its own wrong. A number of authorities are cited but they have no bearing upon this case. These cases are to the effect that the detective entered into a conspiracy with the party charged to commit the crime or persuaded him to commit it in order that he might arrest him. The evidence in the case at bar fails to disclose such a state of facts. Appellant does not claim that he was persuaded by these witnesses to make the illegal sale, but he claims he was not at the saloon and did not make the sale; he denies having seen the prosecuting witnesses. They testified they went to the saloon on Sunday, called for the liquor, it was brought them and they paid for it. They committed no legal wrong in making the purchase. A purchase of liquor during prohibited days or hours does not make the purchaser a party to the crime. The law makes the sale charged an unlawful sale and what-

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ever motive the purchaser may have had in making the purchase it can be no justification to the seller violating the law. No legal wrong was committed by the prosecuting witnesses when they purchased the liquor with the intention of making it the basis of a criminal prosecution. They testified that they went to the saloon and purchased the liquor from the appellant and that there were several men in the saloon at the time drinking. Appellant denied making the sale. It was for the jury to say what testimony was true.

Appellant testified in his own behalf, denied selling the liquor as charged, and testified that he did not see either of the prosecuting witnesses in or about his saloon on the day charged. Upon cross-examination he was asked if during the past year he had not maintained an elevator to elevate drinks to the second floor to be drunk upstairs; whether he had not permitted gambling in the room over his saloon; whether he did not maintain a slot machine in his saloon, and whether he had not kept his saloon open for customers on the day of a certain primary election. To these questions appellant's counsel objected on the ground that the answers might expose appellant to criminal prosecutions; and to the questions concerning the use of the elevator and gambling the witness claimed his privilege and refused to answer unless compelled by the court to do so, on the ground that the answers might tend to criminate him. The court required the witness to answer. The witness answered admitting the use of the elevator, that there was a slot machine, that he had kept his saloon open on primary election day, and that there had been gaming in the upper room. Appellant voluntarily became a witness in his own behalf, and it has been held that the testimony of a defendant who testifies in his own behalf should be subject to the tests applied to the testimony of any other witnesses. *Parker v. State*, 136 Ind. 284.

It is true appellant voluntarily became a witness in his own behalf and his testimony is subject to the tests applied

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to other witnesses. But there can be no reason for refusing to give him the same protection given a witness. Appellant, as a witness, had the right to decline to answer these questions because, under the laws of this State, they would tend to expose him to a criminal prosecution. When he claimed his privilege it was error to compel him to answer. "If," said the court in *City of South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792, "the answer to a question propounded to a witness would furnish a link in the chain of evidence which would convict him of a crime, and if he claim his privilege, he is not bound to answer, whether his answer would be material and relevant, or collateral and irrelevant, to the issue." In *French v. Venneman*, 14 Ind. 282, the court said: "A witness can not be compelled to answer any question, the answering of which may expose or tend to expose him to a criminal charge, or any kind of punishment. He is exempted by his privilege from answering not only what will criminate him directly, but also what has any tendency to criminate him. If the fact to which he is interrogated forms but one link in the chain of testimony which would convict him, he should not be required to answer." See *City of South Bend v. Hardy*, *supra*, and authorities there cited.

We are required by §1964 Burns 1894 on appeals in criminal cases to disregard technical errors or defects in the action of the trial court which did not in the court's opinion prejudice the defendant's substantial rights. But we are not prepared to say arbitrarily that denying appellant the privilege the law gave him and compelling him to answer these questions did not prejudice his substantial rights. The motion for a new trial should have been sustained.

Judgment reversed.

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[No. 3,511. Filed November 27, 1900.]

GAMING.—Evidence.—Criminal Law.—In a prosecution for keeping a room to be used and occupied for gaming it was shown that the room was located over a saloon, the furniture consisting of a round table with a muslin cover and a drawer, chairs, carpet and a lounge. The witnesses, two police officers, went to the room about two o'clock on Sunday morning and found seated around the table five or six men, some of whom were playing cards. Poker chips and money were lying on the table, most of the chips being in front of one of the men playing. Some chips were placed in the middle of the table, and when a game was played defendant would "chip" off into the drawer; that the "pot" went to the man that won. *Held*, that the evidence was sufficient to support a conviction. *pp.* 604–607.

APPEAL AND ERROR.—Record.—Instructions.—Instructions in a criminal cause can only be brought into the record by bill of exceptions. *p.* 608.

From the Monroe Circuit Court. *Affirmed.*

J. R. East, R. H. East and J. E. Kelly, for appellant.

W. L. Taylor, Attorney-General, and *S. D. Clark*, for State.

WILEY, J.—Appellant was prosecuted before the mayor of the city of Bloomington for keeping a room to be used and occupied for gaming, and was convicted. From the judgment of conviction there rendered, he appealed to the court below, where he was tried by a jury and again convicted. His motions for a new trial and in arrest of judgment were each overruled, and the overruling of these motions are the only errors assigned. The first, second, and third reasons for a new trial may be considered together, as they rest upon the proposition that the verdict is contrary to the law and the evidence. The other reasons for a new trial rest upon the admission of certain evidence, upon overruling appellant's motion to strike out certain evidence, upon remarks made by the court during the trial in ruling

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upon the admission and rejection of certain evidence, and upon the refusal of the court to give to the jury instruction number four tendered and requested by the appellant.

It is earnestly urged by appellant's counsel that there is no evidence in the record to support the verdict. In other words, counsel argue that there is a total failure of evidence. If the record shows that there is a total failure of evidence to support the material averments of the affidavit, then the verdict and judgment should not stand. As we have stated, two judicial tribunals have found appellant guilty as charged, and if there is any legitimate evidence in the record to support the result reached, we can not disturb the verdict on the evidence, for by so doing we would be weighing the evidence. This we can not do.

The evidence upon all material points in the case is almost identical with the evidence in the case of *Roberts v. State, ante*, 366, recently decided by this court. Briefly stated, the evidence discloses the following facts: That the room charged to have been kept by appellant for gaming was occupied by him as a tenant of one Ross; that the furniture in the room consisted of a round table with a muslin cover and a drawer, five or six chairs, a carpet and a lounge; the room in question was over a saloon; that the building containing the room was on the "levee" near the depot; that between 1 and 2 o'clock one Sunday morning, two police officers went to the building, went around in the alley through a side door and up a back stairway leading to the door of the room occupied by appellant; that they knocked at the door; that appellant unlocked the door and said "what's the matter?" That upon entering the room they found seated at and around the table five or six men; that when appellant came in with them he sat down at the table at what is called the "take off" drawer; that some of the men were playing cards; that in front of the men playing cards were piles of poker chips; that there was also money on the table; that there were thirty to fifty

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poker chips on the table; that the chips were of different colors; that most of the chips were in front of one of the men playing; some chips were put in the middle of the table, and when a game was played, appellant would "chip off into the drawer;" that the "pot" went to the man that won; that one of the men who was playing cards was the proprietor of the saloon under the room occupied by Neeld; that these officers arrested all the men present, and started to jail with them, when one of the men who was playing cards escaped from them, and that the day after his arrest appellant gave up the room and ceased to occupy it.

On the part of appellant, evidence was introduced to the effect that he rented the room in question for an office; that he was an architect and contractor, and that he used it in which to draw plans, etc., for his work. There is not a word of evidence that there was in the room any instruments or appliances used by architects for drawing plans, etc., save a drawing-board stored away in a closet. It is also shown that on the night appellant and those with him were arrested, he had invited the men up to his room and that he went out and bought a lunch and took it up to the room and that they ate it. Appellant and two others who were with him testified that some of the men played seven-up there, and that they kept the count with poker chips; that the money on the table belonged to one of the men, Nicholson, who was playing cards, being the amount left out of a two dollar bill which he gave appellant with which to buy the lunch, and which he had neglected to put back in his pocket. Appellant testified that the men were not gambling; that he did not keep the room for gaming, and the poker chips used did not represent anything of value. The evidence also shows that Roberts and Strothers, the only witnesses who testified in behalf of appellant, except himself, were then under indictment and awaiting trial, charged with visiting a gambling house, being the same place that appellant is here charged with keeping. This is a succinct but

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fair abstract of the evidence. It is upon this evidence that appellant asks a reversal on the ground that there is no evidence to establish his guilt. If this evidence does not establish the fact that the room kept by appellant was a place for gaming, then the judgment must be reversed.

As was said in *Roberts v. State, supra*, "It may be remarked that there is no direct evidence in the record to show that such place was a gambling house, or a place where gambling was permitted, and hence, if it was necessary to establish the fact by direct and positive evidence, the State has wholly failed. But such is not the law. It often occurs, in prosecutions for the violation of criminal statutes, that it is utterly impossible to establish the defendant's guilt by direct and positive evidence, and, if the State did not have resort to other means of proof, the guilty would go unpunished. In prosecutions for crime it is often necessary to establish guilt by circumstantial evidence. The word 'evidence,' as used in judicial language, signifies all the means by which the existence or non-existence of disputed facts is established. 1 Greenl. on Ev. (15th ed.) §13." Circumstantial evidence is one of the means of establishing a fact in dispute.

It follows, therefore, that if the record establishes the fact that the room kept by appellant was kept as a place for gaming, it must be admitted that it is established by circumstantial evidence. Under the authority of the *Roberts* case, *supra*, and the many authorities there cited, we are clearly of the opinion that the jury had abundant evidence from which they were fully warranted in inferring that the appellant kept the room for the purpose charged in the affidavit. Every material fact shown by the evidence forms a chain of circumstances from which not a link is missing, which leads the fair and unprejudiced mind to the conclusion reached by the jury. As was held in the *Roberts* case, *supra*, and supported by the authorities there cited, it is a question for the jury under the evidence before them to de-

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termine whether or not a particular room was used for gambling, and that they may so find from circumstances indicating that gambling was going on in the room.

The evidence on the part of appellant does not appeal to the mind and conscience of a jury or court with sufficient force to override the reasonable and legitimate inference to be drawn from the damaging facts and circumstances against him, but carries with it an air of suspicion that casts upon it grave doubt and unbelief. The jury were the exclusive judges of the evidence; they saw the witnesses face to face; they observed their manner and demeanor while on the witness stand; they had the right, and doubtless did consider the interest they had in the result of the trial, and though appellant and his two witnesses, Strothers and Roberts, testified that there was no gambling done there, and appellant testified that the room was not kept for gaming, yet the jury had a right to disbelieve their evidence, if they thought from all the facts in the case and the circumstances disclosed before them that they were unworthy of belief. And we have no doubt from the result reached that the jury took this view of their evidence. As to the evidence of Strothers and Roberts, there were certainly some well founded reasons why the jury might at least scrutinize their evidence closely. They were then under indictment and awaiting trial for visiting the very room in question, as being a gaming place, and an acquittal of appellant for keeping such a place would have been greatly to their interest and advantage in their own trials for visiting such place. These facts were all before the jury, and they had a right to, and doubtless did, consider them in determining the credibility of the witnesses and the weight they gave their evidence. We have read all the evidence in the record, and after carefully considering it, we think the facts disclosed are sufficient to support the verdict. - It follows, therefore, that we can not disturb the verdict on the evidence.

Appellant complains of the court's action in refusing to

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give instruction number four, tendered by him. The instructions are not brought into the record by bill of exceptions, and hence are not before us for any purpose. In a criminal case, the only way by which instructions given or refused can be made a part of the record is by embodying them in a bill of exceptions. *Delhaney v. State*, 115 Ind. 499; *Leverich v. State*, 105 Ind. 277; *Brown v. State*, 111 Ind. 441; *Ford v. State*, 112 Ind. 373. In their brief, counsel for appellant say that a bill of exceptions embodying the instructions was tendered to the trial judge with a request that he sign it, but that he refused for a reason stated. With this we have nothing to do. The instructions are not in the record, and as to whether the trial judge did or did not do his duty is not before us.

Other questions discussed by counsel for appellant, under the motion for a new trial, relate to the admission and rejection of evidence, and some remarks made by the court relating thereto. We do not deem it necessary to take up in their order these several questions and to discuss them. We have considered all of them and have reached the conclusion that in such rulings, and the remarks of the trial judge, no errors were committed that were prejudicial to appellant.

As to the error assigned in overruling appellant's motion in arrest of judgment, counsel admit in their brief that the affidavit is good as against a motion in arrest.

Judgment affirmed.

FIDELITY MUTUAL LIFE ASSOCIATION v. MCDANIEL.

[No. 2,852. Filed May 29, 1900. Rehearing denied Nov. 27, 1900.]

PLEADING.—*Exhibit.*—*Appeal and Error.*—The want of an exhibit, when the pleading is not demurred to, is a defect which is regarded as cured by verdict. *pp. 611, 612.*

INSURANCE. — *Application.* — *Concealment of Facts.* — *Pleading.* — Where in an action on an insurance policy defendant answered that insured, in his application, concealed the fact that he had been treated

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and prescribed for by a physician for *la grippe*, which answers, by the terms of the application, were made material to the risk, a reply setting out the statute of the State in which the company was incorporated requiring good faith only on the part of an applicant unless such misrepresentation relates to some matter material to the risk, and alleging that the diseases for which the insured had been treated, which had not been disclosed in the application, were not serious and left no bad effect in his constitution, was not sufficient to avoid the answer. pp. 612-625.

TRIAL.—Practice.—Appeal and Error.—The time during the trial when a request for answers to interrogatories shall be made is largely within the discretion of the trial court, and the action of the court in refusing to permit the defendant to amend interrogatories after return of a general verdict, and before answers to interrogatories were returned, will not be disturbed on appeal, where no abuse of discretion is shown. pp. 625, 626.

From the Marion Circuit Court. *Reversed.*

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

F. M. Finch, J. A. Finch and G. A. Deitch, for appellee.

COMSTOCK, J.—Appellee sued appellant upon a policy of insurance upon the life of her husband, deceased. The complaint was in two paragraphs. The first alleged full compliance with all the conditions of the policy, and the second alleged compliance with the conditions except as to furnishing proofs of death, which, it was averred, were waived. A copy of the policy is made a part of each paragraph. To this complaint appellant filed an answer in three paragraphs: (1) General denial; (2) breach of warranty contained in the so-called certificate of health and revival contract, in this, that in said certificate of health and revival contract, the insured stated that he had not consulted or been prescribed for by any physician, or received any medical treatment since the date of the original application, when, in fact, the insured had consulted, been prescribed for, and received medical treatment for inflammatory rheumatism in 1894; (3) breach of warranty contained in the

original application, in this, that the insured concealed the fact that he had been treated and prescribed for by a physician for a disease, to wit, *la grippe*, in 1892. To the second and third paragraphs of answers, appellee filed a reply in nine paragraphs. The third, fourth, seventh, eighth, and ninth paragraphs were dismissed.

The first paragraph of reply was a general denial. The second was addressed to the third paragraph of answer, and sets forth facts showing that the answer as to diseases, etc., which appellant alleges to be false, was not false in any material respect, and alleges facts showing good faith of insured in making the statement within the statute of Pennsylvania relating to representations in applications for life insurance, which statute is set out in the reply, and is as follows: "That hereafter, whenever the application for a policy of life insurance contains a clause of warranty, of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." The fifth is also addressed to the third paragraph of answer, and is, in effect, the same as the second. The sixth is addressed to the second paragraph of answer. It takes up each separate allegation of the second paragraph of answer and denies the same, pleads the statute of Pennsylvania set forth in the second paragraph of reply, and alleges facts showing the good faith of insured in making the statements in the health certificate and revival contract.

A demurrer was filed to the second, fifth, and sixth paragraphs of reply, and same was overruled as to each. Trial was had and verdict and judgment rendered in favor of appellee for \$2,175. The jury also answered interrogatories propounded by the court.

The first specification of the assignment of errors is waived. The second, third, fourth, fifth, sixth, seventh, eighth, and ninth are based upon the ruling of the court upon the demurrer of the defendant to the several paragraphs of reply. The tenth, upon the action of the court in overruling the motion of the defendant after the cause had been submitted to the jury and it had returned its general verdict, but before it had returned the answers to interrogatories, for leave to amend the interrogatories, and to require the jury to return to its jury box and to return with their general verdict answers to the interrogatories as amended, and in directing the jury to sign the answers to interrogatories as they stood. The eleventh is the overruling of appellant's motion for a new trial.

The demurrer to the second paragraph of reply to the third paragraph of the answer was overruled. The third paragraph of answer bases the defense upon the policy and written application of the insured. Counsel for appellee make the point that inasmuch as neither the policy nor the application is made a part of this paragraph, it is bad; citing *Supreme Lodge, etc., v. Edwards*, 15 Ind. App. 524, and *Landon v. White*, 101 Ind. 249, arguing therefrom without conceding that the third paragraph of reply is bad, that if the second paragraph of reply, which is addressed to the third paragraph of answer is bad, it is good enough for a bad answer. The policy, which is made a part of the complaint, and is the foundation of the action, reads: "In consideration of the application for this policy, which is made a part hereof, a copy of which is hereto attached." The application is indorsed upon the policy. The policy in suit is referred to in the answer, and statements in the application alleged to have been false are set out in the answer. There is much force in the claim of appellant's counsel that the application is a part of the policy. The reference to the policy in the answer obviates the necessity of making it an exhibit to the answer. But conceding, without deciding,

that the instruments named should have been exhibits to the answer, and that the replies, if bad, were good enough for the answer, the answer was not demurred to, and the plaintiff has no exception in the record under which an attack upon the answer can proceed in this court. The policy and application were introduced in evidence. The want of an exhibit, when the pleading is not demurred to, is a defect which is regarded as cured by verdict. *Cummings v. Girton*, 19 Ind. App. 248. The rule that a demurrer to a reply searches the record, does not apply to the record before us. This claim of appellee can not be allowed.

The third paragraph of answer avers that the insured was sick of *la grippe* for two weeks; that he was prescribed for and attended by a physician. The second paragraph of reply, after denying that he had *la grippe*, alleges that if he did have the same, the medical examiner of appellant knew the fact; that such examiner, upon examining the insured, stated to him that he was a first class risk, physically sound and a fit subject for life insurance; that the insured believed this. It then alleges the Pennsylvania statute set out at page two of this opinion regarding the effect of misstatements in the application, and avers that the alleged attack of *la grippe* was not *la grippe* but a severe cold, which yielded readily to treatment; that it did not affect the physical condition of the insured; that no bad effect of a permanent nature resulted therefrom to the insured, and that his death was not in any manner hastened nor caused thereby. From the averments of this part of the reply, it appears that the knowledge of the illness of the insured, which it is alleged appellant had at the time it accepted the application and issued the policy, was acquired by reason of the fact that the medical examiner of the company was intimately acquainted with the insured and was the partner of his family physician who had treated him for the diseases, the knowledge of which he concealed from the com-

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pany. It has been held by this court in *Shaffer v. Milwaukee, etc., Ins. Co.*, 17 Ind. App. 204, that when knowledge is obtained by an agent wholly independent of the business or employment of his principal and in a transaction in which his principal is not connected, such knowledge is not the knowledge of his principal. It is claimed, however, by counsel for appellee, that the knowledge of the examiner above stated was pleaded merely to show the good faith of the insured in his application. The statute of Pennsylvania set out in said paragraph of answer requires good faith only on the part of an applicant, "unless such misrepresentation or written statement relates to some matter material to the risk." The only ailment alleged in this paragraph of answer is "*la grippe*." The averments of this paragraph of reply are that the representations were made in good faith; that the insured did not have *la grippe*; that he had instead a cold which yielded readily to simple remedies, and that this "was not material to the risk." The defendant corporation was a creation of the laws of Pennsylvania; its contracts are to be construed by the laws of that state which must govern its enforcement. The policy recites in witness of the contract: "The Fidelity Mutual Life Association has by its president and treasurer signed this contract at its office in Philadelphia." It promises to pay the sum insured "within ninety days after the acceptance of due and satisfactory proof at its office in the city of Philadelphia."

In *Fidelity, etc., Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197, the Maryland court of appeals held that the policy of appellant was a Pennsylvania contract and controlled by its laws, using the following language: "Everywhere, within and without the state which created it, its contracts are limited, construed, and sustained according to its charter, and the laws which affect its operation. In *McKim v. Glenn*, 66 Md. 484, 8 Atl. 130, this court said: 'It is a familiar principle, that a corporation, and all who deal with it, are bound by the law of its creation, and all

such laws as may be legitimately prescribed for its government by the sovereign authority from which it derives its corporate existence.' It appears to us, therefore, that the inquiry in reference to the answers in the application for insurance ought to be not only whether they were true, but also whether they were made in good faith, and whether they related to some matter material to the risk."

In *Penn Mutual Life Ins. Co. v. Mechanics, etc., Co.*, 19 C. C. A. 286, 72 Fed. 413, 38 L. R. A. 33, 56, it is said: "This is one of a class of statutes passed in many states to relieve against the hardships arising from the strict enforcement at common law of warranties in insurance policies concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit, and of the purest technicality; that such statutes are remedial in their nature, and are quite within the police power of the legislature, is no longer a debatable question * * *. The statute has been construed by the supreme court of Pennsylvania, and our conclusions above stated are in accordance with the views of that court. * * * The construction of a state statute by the highest court of the state is usually authoritative in courts of the United States. * * * And, even if it were otherwise, we should reach the same conclusion in this case."

Counsel for appellant question the application of the Pennsylvania statute only upon the ground that it does not contain the word "warranty" which word is used in the statute. The use of the word "warranty" is not necessary to make a warranty. *Jones v. Quick*, 28 Ind. 125; *Long v. Anderson*, 62 Ind. 537. It is agreed in the application that the statements contained therein are material; they have the effect of express warranties. The failure of the insured to state in his application that he had had a severe cold and

had been treated therefor prior thereto would not be a defense, it being averred in the reply that the cold was trivial and yielded readily to treatment.

In *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516, the insured was required in the application to give full particulars of any illness had since childhood and name the medical attendant or attendants. In construing this question, the court said: "A mere temporary indisposition, not serious in its nature, such as indicated by the evidence on the part of the defendant, other than measles can not be considered an illness, and the mere calling into a doctor's office for some medicine to relieve such temporary indisposition, or the calling at the home of the insured by the doctor for the same purpose, can not be considered an attendance by a physician, nor a consultation with a physician, within the meaning of the question. 'Illness,' as used, means 'a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution of the insured.'" See, also, *Northwestern, etc., Co. v. Heimann*, 93 Ind. 24; *Continental Ins. Co. v. Yung*, 113 Ind. 162; *Connecticut, etc., Co. v. Union Trust Co.*, 112 U. S. 258, 5 Sup. Ct. 119, 28 L. ed. 708; Bacon on Ben. Soc., etc., (2nd ed.) §234, and authorities there cited; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223.

Counsel for appellant cite many cases in support of its claim, among them the five cases following, from the supreme court of Pennsylvania. In *Mutual Aid Soc. v. White*, 100 Pa. St. 12, the insured in his application misstated his occupation. The court held that the insured's occupation was material to the risk. In *Mutual Aid Soc. v. O'Hara*, 120 Pa. St. 256, 13 Atl. 932, it was pleaded that the insured had consulted physicians generally, and, not as in the case before us, that he had consulted a physician for a specified disease.

In addition to pleading the statute of Pennsylvania aforesaid, appellee pleads that the diseases for which the insured had been treated, which had not been disclosed in his application, were not material and left no bad effect in his constitution. The application makes the answers material to the risk. The insured agreed with the company that the answers to his application should be made and were material to the risk. In *Cerys v. State Ins. Co., etc.*, 71 Minn. 338, 27 Ins. L. J., 258, 73 N. W. 849, it was held that where it is stipulated in the policy that the application on which it is based shall be a part of the contract and a warranty by the insured, and if the interest of the latter in the property be not truly stated therein, the policy shall be void, the parties having said for themselves what shall be material, and the assured can not be permitted in case of loss to escape the consequence of making a false answer. He can not be allowed to claim that an answer is immaterial which by his contract shall be considered material. The court cites *Campbell v. New England, etc., Ins. Co.*, 98 Mass. 381. Mr. Justice Gray in this case said: "The parties may, by the frame and contents of the papers, either by putting representations as to quality, history, or relations of the subject of insurance into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and when they have done so, the applicant for insurance can not afterwards be permitted to show that the fact, which of itself they thus declared material to be truly stated to the insurers, was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question." It also quotes *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69; May on Ins., §195, as follows: "While it may well be that a misrepresentation of a matter which does not affect the risk, and is not material in some cases, as is claimed, will not avoid the policy, and whether it is material is a question for the jury, such rule has, we think,

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no application where by the terms of the policy misrepresentations are converted into warranties by a stipulation that an untrue answer will avoid the policy. If it is stipulated that if there is any misrepresentation whatever, the contract should be void, it is of no importance whether it is a warranty or representation. The materiality is contracted for and under the rule as to warranties is not a subject of construction."

Counsel for appellant argue that the deceased having agreed that the answers were material, and the answer to the complaint averring the misrepresentations thereof, that the deceased had been treated by a physician, it was not competent to evade such by the averment that although it was true that he had misrepresented the facts, yet because the disease and the treatment by the physician left no vice in his constitution that the company was not therefore relieved from its liability. We think it may be conceded that the concealment of the fact that the insured had had a cold which yielded readily to treatment was not a misrepresentation of a material fact; but under the decisions, we are of the opinion that a statement of the insured in his application that he had not been attended or treated by a physician was a misrepresentation of a matter material to the risk. An untrue answer to the question as to whether the insured had been accepted or rejected by another company is a material misrepresentation or concealment which will avoid whether the answer is made a part of the contract or 'no' Biddle on Ins., §783. A statement by an applicant in answer to a question that he had been accepted at the ordinary rate, when in point of fact he had been declined at one office and accepted at another but nothing further done, was thought by the court to be a *suppressio veri*. *Fowkes v. Manchester, etc., Ins. Co.*, 3 F. & F. 440. Where in answer to a question as to whether he had been rejected the applicant stated that he was in process of negotiation with another office, and in fact, though he was negotiating, his

life had always been rejected, it was held concealment. *In re General, etc., Life Assurance Co.*, 18 Wkly. R. 396. Where the answer to the question "Has a proposal ever been made on your life at any other office or offices? if so, where? Was it accepted at the ordinary premium, or at an increased premium or declined?" "Insured now in two offices for 16,000 pounds at ordinary rates. Policies effected last year." And though the applicant did have two policies to that amount, one of the offices had declined to increase the amount of insurance and several others had declined him altogether, it was held that there had been a material concealment and that the office was entitled to have the contract set aside. *London Assurance v. Mansel*, 11 Ch. Div. 363.

Whether a misrepresentation by an applicant for insurance is material is a question of law when the facts are ascertained. *American, etc., Soc. v. Bronger*, 11 Ky. Law Rep. 902, 15 S. W. 1118. A false answer in a written application for life insurance to a question as to whether any other company had declined to carry a policy on the applicant's life was a material misrepresentation and avoided the policy. In *Mutual Aid Soc. v. White*, 100 Pa. St. 12, 16, the applicant stated in his application that he was a laborer and a widower. His answers in this respect were false. The court held that the questions are material not only in this, but by the terms of the agreement.

A false statement that the insured had not applied to any other company and been rejected voids a policy of life insurance, although the insured in making it believed it to be true, and the agent of the company knew it to be false when it was made. *Clemans v. Supreme Assembly*, 131 N. Y. 485, 30 N. E. 96, 16 L. R. A. 33. A policy of insurance is voided by a false statement in an application that no foreign insurance company has declined to grant a policy on the life of the insured. *Kemp v. Good Templars, etc., Assn.*, 64 Hun 637, 19 N. Y. Supp. 435.

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Every fact is material which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium; nor is it of any consequence that the death was not in fact produced by a cause connected with the subject of the misrepresentation. If there was a suppression of a material fact, which, if disclosed, would have caused the insurance to be refused, it is fatal to the policy. *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466. Where a specific answer is asked and the applicant makes an untruthful answer, the policy is avoided, whether the answers are warranties or representations. Bacon on Benefit Societies and Life Insurance, §220. A misrepresentation by one party to a fact specifically inquired about by the other will exonerate the latter. It is particularly applicable to written inquiries referred to in the policy. *Miller v. Mutual, etc., Ins. Co.* 31 Iowa 216.

It is for the court to rule whether or not a matter is material, and for the jury to determine whether the statements concerning such matters material are substantially true. Bacon on Benefit Societies and Life Ins., §212; *Campbell v. New England, etc., Ins. Co.*, 98 Mass. 381; *Davenport v. New England, etc., Ins. Co.*, 6 Cush. (Mass.) 340; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. ed. 644; *Day v. Mutual, etc., Ins. Co.*, 1 McArthur (D. C.) 41, 29 Am. Rep. 565.

In *Carson v. Metropolitan Life Ins. Co.*, 1 Pa. St. 1, it was held that parties to a contract by the very written stipulations settle for themselves all question as to its materiality. The test of materiality of a misrepresentation or concealment in a contract of insurance is that it influences the insurer in determining whether to accept the risk or not. If the insured conceals from the insurer the fact that prior to the date of the policy he had been attended for a serious disease, there can be no recovery, and the fact that he did not die from the disease for which he was attended has no proper place in the consideration of the question. In this

case, the court adopted the view in the matter of materiality as contained in *May on Insurance*, Par. 184, namely: "The parties to a contract by the very written stipulation settle for themselves its materiality." Again, "If John W. Carson prior to the date of the policy had been attended by a physician for any serious disease or complaint and had concealed that fact from the company, there could be no recovery and the fact that he did not die from the disease for which he was attended had no proper place in the consideration of the question." To sustain the point, the court quotes the vigorous language of Black, C. J., in *Hartman v. Insurance Co.*, 21 Pa. St. 466.

In *Joyce on Insurance*, par. 2070, the authority cites and summarizes numerous cases. Some of them we give. "If specific inquiries are made whether the assured has medical attendance within a stated period of time, the fact is thereby made material, and must be disclosed." *Mutual Aid Soc. v. O'Hara*, 120 Pa. St. 256, 13 Atl. 932, where the inquiry was made, "How often has medical attention been required?" and the answer was "Two years ago," and the name of the medical attendant being asked, assured gave the name of Doctor R——, who had in fact attended him about a year before, but the assured did not disclose the fact that he had a relapse shortly thereafter when he was attended by Dr. C. and that three physicians in attendance had despaired of his life; such information was found immaterial by the jury, and no intended fraud existed; nevertheless, the policy was declared void. *Cazenove v. British, etc., Co.*, 29 L. J. C. P. 160.

In *Metropolitan Ins. Co. v. McTague*, 49 N. J. L. 587, 9 Atl. 766, it is held that the statement by the assured that he has not been prescribed for by a physician is falsified by the fact that a physician has prescribed for a cold. This decision is cited with approval in *Cobb v. Covenant, etc., Assn.*, 153 Mass. 176.

In *White v. Providence, etc., Soc.*, 163 Mass. 108, 39 N.

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E. 771, 27 L. R. A. 398, it is held that if the application ask "By what physician were you last attended?" the applicant is held to have been attended by a physician within the meaning of that question when it appears that he had called upon a physician and submitted to an examination by him, and had subsequently again called upon the same physician and consulted him.

In *Brown v. Metropolitan Ins. Co.*, 65 Mich. 306, 32 N. W. 610, it is held that where the name of the physician who had last attended was asked that this must be construed to mean an attendance for some disease of importance and not a mere temporary indisposition.

In *World, etc., Ins. Co. v. Schultz*, 73 Ill. 586, it is held that if the inquiry is as to the last medical attendant the fact is so far rendered material that it must be disclosed or truly stated. The insurer may desire to consult with the medical man who was last in attendance, since the information possessed by him may have an important bearing upon the risk and influence largely the judgment of the insurer. If the name of the last medical attendant is asked, it must be given whether he be a quack or regular physician. *Everett v. Desborough*, 5 Bing. 503. Concluding section 2070, *supra*, Joyce says: "In all cases, however, where questions are asked as to assured's medical attendant, consultation of physician, medical treatment, and the like, the assured should answer in good faith; having in view that the obvious purpose of the inquiry, manifest from the words used, should be considered. If in the light of the evidence presented it is apparent that the assured's answer can be viewed otherwise than as evasive and incomplete, and as intended to prevent a disclosure as to past health from the physician who could best give information as to the same, or to prevent further inquiry by the assurer, then such evasive or incomplete answer ought to avoid the contract. But courts should not by construction in any case force words out of their ordinary and accepted meaning, and if

the answer given is clearly responsive to the question, according to the accepted meaning of the words used, it should be held sufficient. We believe these suggestions fully accord with the decided cases. The question whether the answers have been made in good faith is generally one for the jury."

The latest case to which our attention has been called is *March v. Metropolitan, etc., Ins. Co.*, 8 Ins. L. J. (N. S.) 30, 40 Atl. 1100. The case was decided by the supreme court of Pennsylvania in January, 1899. It was one involving the statute in question. After quoting the section of the statute upon which appellee in this case relies, the court say: "The meaning of this language is perfectly plain. A misrepresentation or untrue statement in an application, if made in good faith, shall not avoid the policy unless it relate to some matter material to the risk. If it does relate to such matter, the act is inapplicable. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue, it shall not avoid the policy. As we said in *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064, this act has effected a change in life insurance policies, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence as to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. Ordinarily questions of good faith and materiality are for the jury, and, where the materiality of a statement to the risk involved is itself of a doubtful character, its determination should be submitted to the jury. But it was never intended by the act of 1885, nor did that act assume, to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact. * * * A strong case

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illustrating the materiality of this class of questions is, *Aid Soc. v. O'Hara*, 120 Pa. St. 256, 13 Atl. 932. In the opinion delivered by Paxson, J., it is said: 'The eighth interrogatory in the application is: Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of the doctor in full. The object of this inquiry is manifest. If the assured had no medical attendance within the time prescribed, and so answers, that is the end of it. But, if he had such attendance, then the company is entitled to know for what cause he had medical advice or aid, and the name and address of the doctor, in order that they may ascertain the particulars from him. And, if the assured falsely answer that he had no medical attendance, he is not entitled to recover.' This case was decided in 1888, three years after the passage of the act of 1885. In *Mengel v. Insurance Co.*, (176 Pa. St., 280, 35 Atl. 197,) decided in 1896, one of the questions was, 'Have you always been temperate?' and the answer was, 'Yes.' We held there could be no recovery, because the uncontrovertible proof was that the insured had been very frequently drunk, and at least six times during the preceding five years had required the services of a physician from that cause. He died in four months after the policy was issued, of delirium tremens resulting from intemperance. Another point was: 'The insured having, in his application, in answer to question 23 (How long since you have consulted any physician? For what disease? Give name and residence), answered, 'About one year, for light influenza; Dr. James W. Keiser, Reading, Pa.; and the plaintiff, having, in the proof of death, by affidavit of Dr. James W. Keiser, shown that, during the five years preceding the applicant's death, he attended said applicant for vomiting and nausea, the effects of over-drinking, the duration being from twelve to thirty-six hours; and it being the uncontradicted evidence of said James W. Keiser that he had attended the said applicant within four months prior

to the application, and prescribed for vomiting and nausea, induced by drunkenness,—there can be no recovery in this case, and the verdict must be for the defendant. And the facts being subsequently undisputed, the learned judge reserved the point, but substantially entered judgment on the verdict. Without going into other matters assigned for error, the facts admitted in this point show such a breach of a material warranty as to require the court to pass upon it as a matter of law.’ The judgment was reversed, and judgment entered for defendant on the point reserved. In *Aid Soc. v. White* (100 Pa. St. 12), this court, (Gordon, J.) said: ‘In the application appear, among others, the following questions and answers: “What is your age and occupation? Answer. Sixty-two years and four months. Occupation, laborer. (2) Are you married? (b) Give name of consort. Answer (a) ——. (b) Widower.” These questions are very plain and simple, and such as any one capable of entering into a contract might readily comprehend. They were also material, not only in themselves, but by the terms of the agreement; and the insurer had a right to expect straightforward and truthful answers, and so the court should have instructed the jury?’ We held that the questions as to both occupation and marriage were material, and that the court should have so instructed the jury, and should have left nothing to them except the truth or falsity of the answer. In both the cases *Insurance Co. v. Huntzinger*, 98 Pa. St., 41, and (*Insurance Co. v. McAnerney*, 102 Pa. St. 335) the questions were as to the amount of other insurance, which it was claimed were falsely answered; and the decisions were chiefly put upon the ground that the answers were warranties, but the materiality of the questions was assumed in both. In *Wall v. Royal Soc.* (179 Pa. St. 355, 36 Atl. 748,) the questions and answers related to the health of the insured, and the attendance of a physician. The judgment was reversed on the ground, substantially, that it was

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competent to the defendant company to prove the falsity of the answers, without regard to the question whether they were warranties, or only misrepresentations.”

The averment in the answer that the insured was attended by and prescribed for by a physician was of a material fact. The reply does not meet this averment. It follows that it was only a partial reply to the paragraph in question.

The fifth paragraph of reply is subject to the same objections made to the second. The authorities heretofore cited apply. The sixth paragraph seeks to avoid the materiality of the agreement made between the defendant and the insured by a statement of facts. It is bad under the authorities cited.

The tenth specification of error is based upon the action of the court in refusing leave to the defendant to amend the interrogatories propounded to the jury after it had returned the general verdict, and before it had returned answers to interrogatories, and to require the jury to return to the jury box and return answers to the interrogatories as amended, and in directing the jury to sign answers to interrogatories as they stood. This action is assigned as a reason for a new trial. The facts, as shown by the bill of exceptions, are as follows: Interrogatories were prepared by both appellant and appellee and were submitted by the court to the jury. In interrogatories three, five, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, counsel for appellant, after the jury had returned into the court room with their general verdict, and after the general verdict had been signed, and the interrogatories to the jury read with the answers of the jury to each interrogatory, claimed to have discovered a mistake in the interrogatories, in this, to wit, that in each of said interrogatories the year “1895” had been written when it was intended to write therein the year “1894,” and counsel for appellant there-

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upon requested the court for leave to change said year in each of said interrogatories and that the jury be directed to return to the jury room and answer the interrogatories as amended. To this counsel for appellee objected, stating as reason that it did not appear that counsel for appellant had made a mistake in writing the year "1895" in each year while intending to write the year "1894"; that, in argument, the counsel for appellant read the interrogatories to the jury; had made some changes in several of the interrogatories, in this, that counsel had changed the year "1895" to 1894 in such interrogatories, but that, in the interrogatories now sought to be amended, counsel for appellant had not, at the time of reading the same in argument, changed the same or asked leave to change the same; and that counsel for appellee, in argument, read the interrogatories to the jury, reading the year "1895" in each interrogatory in the presence and in the hearing of counsel for the appellant, and had then stated to the jury that there was no evidence of any sickness or illness of insured during the year 1895, and that the jury should return answer to each of said interrogatories "no evidence"; that counsel for appellant did not at such time make any claim to any mistake in said years, and did not ask to change said interrogatories so as to make the year "1895" read "1894." Section 555 Burns 1894, §546 Horner 1897, does not designate the time when during the trial the request for answers to interrogatories shall be made. It is largely within the discretion of the trial court, and unless there is a clear abuse of this discretion, the action of the trial court will not be disturbed. *Bachman v. Cooper*, 20 Ind. App. 173. In the following cases, it has been held that they must be submitted to the court before the argument commences, or they may be properly refused: *Ollan v. Shaw*, 27 Ind. 388; *Malady v. McEnary*, 30 Ind. 273; *Miller v. Voss* 40 Ind. 307; *Glasgow v. Hobbs*, 52 Ind. 239. See, also, *City of Huntington v. Burke*, 21 Ind. App. 655. Under the circumstances shown, there was no abuse of discretion.

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The other questions discussed, including those raised by cross-assignment of errors, require for their solution an examination of the evidence. It is earnestly and ably argued by counsel for appellee that it is not properly in the record. In view of this claim, and inasmuch as the judgment must be reversed upon the rulings of the trial court upon the pleadings, these other questions are not considered.

Judgment reversed, with instructions to sustain the demurrers to the third, fifth and sixth paragraphs of reply.

**SUPREME TENT OF THE KNIGHTS OF THE MACABEES
OF THE WORLD v. VOLKERT.**

[No. 8,047. Filed April 27, 1900. Rehearing denied Nov. 27, 1900.]

APPEAL AND ERROR.—Record.—Motion to Strike Out Parts of Pleading.—In order to present any question for review upon appeal on the ruling of the court upon a motion to strike out a pleading or a part thereof, such pleadings or parts of pleading, the motion, and ruling thereon, must be brought into the record by a bill of exceptions. *p. 630.*

BENEFICIAL ASSOCIATIONS.—Forfeitures.—Prohibited Occupations.—Estoppel.—Where the local officers of a fraternal insurance company received the dues and assessments of a member after he had engaged in the liquor traffic, with a knowledge of such fact, and the company received and retained the last payment with a knowledge thereof, and of the further fact that he died while so engaged, the company will be estopped from asserting a forfeiture of the certificate under a by-law prohibiting members from engaging in the sale of intoxicating liquors. *pp. 631–638.*

SAME.—Forfeitures.—Prohibited Occupations.—Estoppel.—Where a fraternal insurance company sent blank forms for proof of death and required them to be filled out and sworn to by beneficiary, with knowledge that insured had engaged in the sale of intoxicating liquors in violation of the by-laws of such company, the company is estopped from setting up a forfeiture of the certificate on the ground that he engaged in such prohibited occupation. *pp. 638–640.*

SAME.—Certificate.—By-Laws.—Conflict.—Where the certificate issued by a fraternal insurance company provides that the board of trustees may suspend members from all benefits of the order who after admission engage in occupations prohibited by the by-laws, and the by-laws provide that members who engage in such prohib-

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ited occupations shall stand suspended, the court, in determining the rights of the parties, will adopt the provision that will give the greater right to the insured and his beneficiary. *pp. 640-642.*

BENEFICIAL ASSOCIATIONS.—Collection of Assessments.—Local Officers Agents of Company.—Where payment of dues and assessments to the local officers is the only method provided by a fraternal insurance company, and it is made the duty of such officers to transmit same to the home office of the company, the local officers in the collection and transmission of dues and assessments are the agents of the company, notwithstanding a provision in the by-laws to the contrary. *pp. 643, 644.*

From the Marion Circuit Court. *Affirmed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellant.

F. M. Finch, J. A. Finch and G. A. Deitch, for appellee.

WILEY, C. J.—On October 24, 1893, appellee's husband made application for membership in appellant order, and was issued a certificate of membership. By the terms of this certificate, appellee was to receive a benefit of not to exceed \$1,000 upon the death of her husband. The certificate, among other things, provided that the board of directors might suspend a member from all benefits "who after admission engaged in occupations prohibited by the laws of the order and the action of such board in such cases shall be final." Section 142 of the by-laws provides that "if a member engages in the sale of intoxicating drinks" he shall be suspended from the order without action on the part of the officers, "and the record keeper, when any such suspension takes place, shall not receive further assessments from such suspended member. He shall enter such suspension on his record and report the same to the supreme record keeper as he would report any other suspension, giving date and cause thereof and in case any assessment shall be received from a member who has thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation."

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Some time after appellee's husband was accepted as a member, he did engage in the saloon business and sold intoxicating drinks, and while so engaged died. The officers of the local tent knew that appellee's husband was engaged in selling intoxicating drinks, and with such knowledge continued to accept his dues and assessments. Appellant's deputy supreme commander also knew that the member was so engaged. On the day appellee's husband died, a committee from the local tent called at his home, which was connected with his saloon, to take charge of the burial. This committee, on the same day, notified the chief officers of appellant of such death and stated in the notice that he was engaged in the saloon business. At the same time, they collected from the appellee an assessment which was then due from her husband and remitted it to the head office of appellant. Upon receipt of the notice of death, the chief officers sent blanks for making proof of death and such proof was made and returned by appellee. Appellant refused to pay the amount, or any amount covered by the certificate, and the appellee brought this action to enforce payment. The complaint was in three paragraphs. Appellant answered in three paragraphs, and upon the issues being joined, there was a jury trial resulting in a verdict for appellee. Appellant's motion for a new trial was overruled and judgment rendered on the verdict.

The errors assigned are: (1) The overruling of appellant's demurrer to the first paragraph of complaint; (2) the overruling of appellant's motion to strike out parts of the third paragraph of complaint; (3) the sustaining of appellee's motion to strike from the files the second paragraph of answer, and (4) the overruling of the motion for a new trial.

The first error assigned is waived by appellant in failing to discuss it. In *Tucker v. Sellers*, 130 Ind. 514, the court say: "The appellant's counsel have not pointed out any objections to the complaint, but say, in general terms, that

it is not good. We must, under the long settled rules of the court, decline to search for defects in the complaint, and assume that none exist. Counsel can not, by general assertions in their briefs, secure a reversal of a judgment because of supposed defects in a pleading. Defects which are not apparent from a bare statement must be specifically pointed out by counsel, and they must support their position by argument, and, if need be, by the citation of authorities." Because counsel have not attempted to point out and argue any defects in the first paragraph of complaint, we have not thought it necessary to refer to its several averments.

The second and third specifications of the assignment of error do not present any question for decision. The rule is firmly settled that to present any question for review upon appeal on the ruling of the trial court to strike out a pleading or a part thereof, such pleading or parts of pleading, the motion and ruling thereon, must be brought into the record by a bill of exceptions. *Iddings v. Iddings*, 134 Ind. 322; *Dudley v. Pigg*, 149 Ind. 363; *Holland v. Holland*, 131 Ind. 196; *City of Indianapolis v. Consumers, etc., Co.*, 140 Ind. 246, 27 L. R. A. 514; *Smith v. State*, 140 Ind. 343; *Owens v. Tague*, 3 Ind. App. 245; *Huggins v. Hughes*, 11 Ind. App. 465; *Bennett v. Seibert*, 10 Ind. App. 369; *Fordice v. Beeman*, 10 Ind. App. 295. Appellant has failed to comply with this rule in this instance, and hence, upon the questions arising upon such rulings, there is nothing presented for decision.

This leaves but one question for consideration, viz.: The overruling of appellant's motion for a new trial. Before entering upon the discussion of this branch of the case, it may be important briefly to state the facts relied upon by appellant as set out in its first paragraph of answer, and the facts which appear from appellee's reply. The answer alleged in substance that the appellant is a mutual, fraternal, beneficial society incorporated under the laws of the

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state of Michigan; that the supreme tent is the highest authority in the association and authorized to prescribe laws for its government. Subordinate to this are great camps, and subordinate tents. It is further averred that the laws of the supreme tent enter into and become a part of the contract between the association and its beneficial members. The answer then sets out verbatim certain provisions of the laws governing the association, showing the manner in which it is organized, its objects, etc. And among other laws pleaded is section 142, being the one referred to in plaintiff's complaint which mentions the classes of persons who shall not be admitted into the order. The prohibitory clause contains the following: "And no person shall be eligible for membership in the order who is engaged either as principal, agent, or servant in the manufacture or sale of spirituous, malt, or vinous liquors as a beverage, and should any beneficial member of the order engage in any of the above named prohibited occupations after his admission, his benefit certificate shall become null and void from and after the date of his so engaging in such prohibited occupation and he shall stand suspended from all rights to participate in the benefit funds of the order, and no action of the tent or of the supreme tent shall be a condition precedent to such suspension. The record keeper when any such suspension takes place shall not receive further assessments from such suspended member. He shall enter such suspension on his records and report the same to the supreme record keeper as he would report any other suspension, giving date and cause thereof, and in case any assessment shall be received from a member who has thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation."

The laws set out in this paragraph also show that a regular application must be made for membership, showing

among other things the occupation of the applicant. The laws also provide that the subordinate tent shall be the agent of the members in making application for membership, the collection and transmission of dues and assessments, the serving of notices and the like. The answer then proceeds to aver that the deceased, Thomas H. Powell, applied for membership on the 21st day of September, 1893, through the Indianapolis tent number thirty-five, organized as a subordinate tent in the city of Indianapolis; that said application was in writing, signed by the appellant upon a blank form furnished for the purpose, and that in reliance upon the representations made in the application the beneficial certificate was issued to the deceased. The answer then avers that the deceased engaged in the saloon business and admits that assessments were received thereafter, but without knowledge on the part of the association that he was so engaged, and that the association had no such knowledge until after his death. It is then averred that the association is ready and willing to return to the appellee the assessments received, and the amount thereof is brought into court for her use and benefit. With this paragraph of answer was filed, as an exhibit, the written application of the insured for membership. By this application, it is disclosed that the applicant's occupation was that of a bookkeeper, and in it he also states that he was never engaged in the sale or manufacture of intoxicating liquors. The paragraph closes by averring that by reason of the facts therein stated, all rights under the beneficial certificate were forfeited by the deceased having engaged in the sale of intoxicating liquors. A copy of the certificate issued to the deceased was also filed with the answer as an exhibit.

In the affirmative reply to the first paragraph of answer, facts are alleged whereby it is sought to show a waiver and estoppel on the part of appellant. It is averred that ten months after the insured engaged in the saloon business, appellant, with full knowledge of the facts, continued to recog-

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nize him as a member, and continued to levy and collect assessments and dues of him up to the time of his death; that on the day of his death, an officer of appellant called at the saloon of decedent, then knowing it to be such, and collected and receipted for assessments and dues which he claimed to be then due; that all of said assessments so collected have been retained by appellant; that although appellant knew he was so engaged in the saloon business, it failed and refused to suspend him, and up to his death continued to recognize him as a member in good standing.

In the third paragraph of reply, it is averred that an officer of the subordinate tent, to which the decedent belonged, on the day he died called at his place of business and collected dues and assessments, and forthwith remitted the same to the appellant, and informed appellant that the said insured was dead, and that at the time of his death he was engaged in the saloon business; that with such knowledge, appellant accepted and retained the money paid upon such assessment, and never offered to pay or tender it back.

The fourth paragraph of reply is like the third, with the additional averment that after appellant had received notice of the death of assured, as stated in the third paragraph, it sent to appellee blank forms for proof of death, which it required her to make out and be sworn to, and which she returned when completed.

Appellant's motion for a new trial rested upon these reasons: (1, 2, 3) That the verdict is not sustained by sufficient evidence and is contrary to the law and the evidence; (4) that the amount of recovery assessed by the jury is erroneous, being too large; (5, 6) that the court erred in giving and in refusing to give certain specified instructions; (7, 8) that the court erred in admitting and in overruling appellant's motion to strike out certain evidence.

The first question discussed under this branch of the case

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is instruction number three, given by the court on its own motion. In this instruction the court stated to the jury that appellant by its answer admitted that it had knowledge that the decedent was engaged in the saloon business immediately after his death, and that if the jury found that on the day of his death, appellant, by an officer of the subordinate tent, to which decedent belonged, collected money from appellee for an assessment or dues upon the certificate, or by reason of his membership in appellant order, and that said money was remitted to and received by appellant after it had knowledge that the decedent had engaged in the saloon business, and that appellant did not tender back said money before this action was commenced and still retained it until the commencement of the action, then appellant would be estopped to question the validity of the certificate on the ground that decedent had violated the laws of the order in engaging in the sale of intoxicating liquors. While worded differently the same legal proposition is stated in the fourth instruction given by the court on its own motion as that in the third, and the two may be considered together. Complaint is made of these two instructions that they make no discriminations as to the rank and authority of the officer of appellant to whom such knowledge was communicated. The instructions proceed upon the theory that the knowledge was communicated to appellant itself. As appellant is a corporation, this of course implies that the knowledge was communicated to one or more of its officers. It is urged that notice to the recorder of the subordinate tent to which the decedent belonged, or to the supreme recorder, would not be notice to appellant, as they acted merely in clerical capacities. We are not called upon to decide this question, for the instructions speak of notice and knowledge to appellant and not to any officer or officers.

In *Masonic, etc., Assn. v. Beck*, 72 Ind. 203, the word "void" was used in the certificate. The court held that it meant "voidable," and in deciding the case, said: "The

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logical and necessary deduction from this doctrine is, that a distinct act of affirmance of the contract by the party entitled to avoid it, made with knowledge of the facts, and especially such acts as the demand and receipt of premiums or assessments, would constitute a waiver of the forfeiture or of the right to annul the contract; and so it is held in several cases already cited. * * * There is no reason why this waiver may not occur after, as well as before, the death of the person whose life was insured."

In *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376, the insured member was in arrears. On the 19th of the month, he gave a friend money to pay his arrears dues. On the following day he was killed and on the same day the friend paid the money to the local lodge, which with knowledge of the fact of such death, etc., accepted the money and transmitted it to the supreme lodge with a report of a committee that the money was paid after the death of the insured. The supreme lodge received and retained the money until after suit was brought on the certificate. The court said: "So it seems that the defendant, with the full knowledge of all the facts as to the time and manner of the payment of this money, accepted and retained it long after the commencement of this suit. This certainly amounted to a waiver of the forfeiture, if one had occurred. *Joliffe v. Madison Mutual Ins. Co.*, 39 Wis. 111. For both the lodge, which was the agent of the defendant for that purpose, received and transmitted the money, and the defendant itself accepted and retained it after notice of the death of Erdmann, and with full knowledge of all the facts relating to the payment. * * * We have already said there was nothing in the charter of the defendant which rendered the doctrine of waiver inapplicable to it. We, therefore, hold that the legal effect of accepting and retaining the money paid on behalf of Erdmann, with full knowledge of the facts, operated as a waiver of the forfeiture."

In the case of *Warnebold v. Grand Lodge*, 83 Iowa 23, 48

N. W. 1069, the court say: "It is claimed that, although the said Warnebold had paid all assessments for death losses up to the time of his death, yet that he had forfeited his membership in the Evening Star Lodge by failure to pay certain dues to the lodge. It is true that certain dues were past due at one time, but previous to his death these arrearages were paid to the satisfaction of the officer whose duty it was to collect dues. No action was taken by the lodge suspending Warnebold from membership because of this delinquency. So far as the records of the lodge disclosed, he was a member in good standing at the time of his death. But it is claimed that by failing to pay his dues at the proper time, by the constitution of the order he was suspended without any action being taken. This ignores all the rules of law applying to waiver and estoppel. The doctrine that there is something so binding and sacred in a contract of insurance that waiver and estoppel can have no application to them has long since been exploded. We need not cite authority upon this point. It is too well understood to be now questioned. When the defendant and its subordinate local lodge received Warnebold's money, and adjudged that he was in good standing when he died, it is not a matter of much consequence what may be the laws or rules or regulations of the order. If any court were to hold that in any ordinary contract such acts did not constitute a waiver of all delinquencies, it would be an adjudication which would command the respect of no one, and there is no reason why a contract of insurance should be construed differently from any other contract."

The case of *Gray v. National, etc., Assn.*, 111 Ind. 531, is in point. There the defense rested upon a by-law forbidding the issuing of a certificate to a person under eighteen years of age. The assured was under that age, of which fact the company had knowledge. In deciding the case, the court held that a life insurance company organized under the laws of this State which issues a policy to one

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under the age required by its by-laws merely, with knowledge of the insured's true age, or which after obtaining such knowledge, still retains the consideration and makes no offer to cancel the contract, is estopped to set up the matter of age as a defense to an action on the policy.

In Iowa, it was held that where a benefit society issued a certificate of membership conditioned to be void if the beneficiary was not a "natural heir" of the member, and continues to collect assessments after knowledge of the fact that the beneficiary was not a natural heir, such acts on the part of the association constitutes a waiver of such condition. *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa 734, 50 N. W. 29.

In the case of the *Supreme Tribe of Ben Hur v. Hall*, 24 Ind. App. 316, it was held that an insurance society, which demands and accepts a payment of dues after the death of a member, with knowledge of such death, is estopped from denying liability on the certificate of membership. We refer to that case and the authorities there cited without further comment. In this connection, it is proper to say that appellant relies upon section 142 of its by-laws, which defines "prohibited occupations" and the consequences arising thereunder. One of these is to engage in the manufacture or sale of intoxicating liquors. It is then provided that in case any beneficial member should engage in any of such "prohibited occupations," "his benefit certificate shall become null and void from and after the date of his so engaging, * * * and he shall stand suspended from all rights to participate in the benefit funds," etc. It is further provided that "no action of the tent, or of the supreme tent shall be a condition precedent to such suspension." It is further provided that the payment of any assessment by such prohibited member and the receipt thereof, shall not continue the benefit certificate in force, nor shall it be a waiver of his engaging in such prohibited occupation. Appellant's learned counsel urge that this by-

law is self-executing, and hence the mere fact that the insured engaged in a prohibited business forfeited his right to the beneficial membership; that no action on its part was necessary to declare a forfeiture, and hence it is absolved from liability. We can not adopt this view. Insurance contracts should be construed liberally in favor of the insured, and the facts that the insured paid his dues and assessments to the local authorities after he engaged in the liquor traffic, with the knowledge of the fact that he was so engaged, and that appellant received and retained the last payment with a knowledge of the fact, and the further fact that he died when so engaged, estops it from now asserting that the beneficial certificate was forfeited. The instructions under consideration correctly stated the law.

By the ninth instruction the court told the jury that if they found that after the death of decedent, appellant obtained knowledge that he had engaged in the liquor traffic, and with such knowledge had sent duplicate blank forms for proof of death, together with blank claimants' affidavits, and required them to be filled out and sworn to by appellee, and which was done, then appellant would be estopped to claim a forfeiture of the certificate on the ground that he engaged in such prohibited occupation. Before taking up this instruction for discussion, it may not be out of place—though somewhat foreign—to say that the record shows that after appellee had complied with appellant's requirements in making proofs of death, the company was dissatisfied upon one point, viz.: That there was a discrepancy on the question of the insured's age as given by him in his application and as shown by the proofs. The proofs of death are dated August 30, 1895. On September 23rd following, appellee received a postal card from the record keeper of the local tent calling her attention to such discrepancy; that he did so upon information from the supreme tent, and asked for additional information. This was done, and about two months thereafter, appellant informed appellee it would

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not pay her the claim evidenced by the certificate because her husband had engaged in the saloon business. Recurring, after this diversion, to instruction number nine, we are clearly of the opinion that, as applied to the facts, it correctly stated the law. The identical question has been decided in this State in the case of *Replogle v. American Ins. Co.*, 132 Ind. 360, in which the court say: "An insurance company may, unquestionably, waive the right to avoid a policy for breach of some of its conditions. Any act done after notice of the breach of conditions which recognizes the validity of the policy is a waiver of the right to avoid it for that reason. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11; *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Schreiber v. German American, etc., Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Phenix Ins. Co. v. Lansing*, 15 Neb. 494, 20 N. W. 22; *Webster v. Phenix Ins. Co.*, 36 Wis. 67; *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483; *Brink v. Hanover Ins. Co.*, 80 N. Y. 108; *Osterloh v. New Denmark, etc., Ins. Co.*, 60 Wis. 126, 18 N. W. 749; *Viele v. Germania Ins. Co.*, 26 Iowa 9. In the case of *Titus v. Glens Falls Ins. Co.*, *supra*, the court said. 'When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interest, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver can not be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after

knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law, waived, and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel.' In *Cannon v. Home, etc., Ins. Co., supra*, the supreme court of Wisconsin say: 'The proposition upon which counsel rely is this: that a party can not occupy inconsistent grounds or positions; that one who relies upon the forfeiture of a contract can not, at the same time, treat the contract as an existing and valid one, nor call upon the other party to the contract to do anything required by it; or, to apply the proposition to the precise facts in the case, that, as the defendant, in its correspondence with the attorneys for the plaintiff, after full knowledge of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the policy, it could not, after the plaintiff had gone to the expense and trouble of furnishing these proofs, change its ground and claim that the policy was no longer in force. We think this proposition is sound in law and amply sustained by the doctrine of the adjudged cases.' To the same effect, and equally emphatic, is the case of *Gans v. St. Paul Fire, etc., Co., supra*. The proposition above quoted from *Titus v. Glens Falls Ins. Co., supra*, was approved by this court in *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 93, 9 L. R. A. 317."

There is an apparent conflict between one of the provisions of the by-laws, 142, and a provision of the certificate sued on. In the latter it is provided that "the board of trustees may suspend members from all benefits of the order, * * * * * who after admission engage in occupations prohibited by the by-laws of the order and the action of the board in such cases shall be final," while the by-laws say that the member "shall stand suspended," etc.,

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if he engage in a prohibited occupation. This being the case, the court, in determining the rights of the parties, will adopt the provision that will give the greater right to the insured and his beneficiary. In the case of the *Northwestern, etc., Ins. Co. v. Hazlett*, 105 Ind. 212, the court say: "It thus appears that two stipulations were incorporated in the policy, covering the same subject-matter. The one providing that upon certain conditions the policy should become absolutely void; the other, that upon precisely the same conditions, the insurance company might avoid the policy and absolve itself from liability to a certain extent. Since both of these conditions can not stand together, the inquiry is, which shall prevail? * * * A forfeiture will not be enforced unless it is clearly demanded by established rules governing the construction of written agreements. When a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provision most favorable to the assured will be adopted. *Moulton v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. ed. 447; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. ed. 563. Again, in the same case at page 216, the court say: "Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy. *Carson v. Jersey City Ins. Co.*, 14 Vroom, N. J. L. 300, 39 Am. R. 584; *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Bliss Life Ins.*, §385." See, also, *Phoenix Ins. Co. v. Lorenz*, 7 Ind. App. 266; *Grant v. Lexington, etc., Ins. Co.*, 5 Ind. 23; *Kentucky, etc., Co. v. Jenks*, 5 Ind. 96; *Franklin, etc., Ins. Co. v. Wallace*, 93 Ind. 7; *Penn, etc., Ins. Co. v. Wiler*, 100 Ind. 92.

Niblack on Accident Insurance and Benefit Societies, (2nd ed.) p. 294, §147, says: "It is, undoubtedly, the

general rule that a member of a society may take notice of, and is bound by its articles of association and by-laws, although they are not recited or referred to in his certificate of membership. But where the terms of a by-law and the terms of a certificate, while consistent with the charter, are inconsistent with each other, it must be held that the society has waived the provisions of the by-law in favor of the assured, and wherein they are inconsistent with the provisions of the certificate, the latter will control the rights and liabilities of the parties." *Olmstead v. Farmers' Ins. Co.*, 50 Mich. 200, 15 N. W. 82, is in point. A by-law of the company provided the time and manner of paying assessments, and if not paid within thirty days thereafter the insurance "may be suspended or canceled by the secretary or board of directors," etc. It was held that the board not having taken any action toward the suspension of the insured or the cancelation of his policy for non-payment of assessment, he was entitled to recover for his loss.

By instruction number ten, the court told the jury that a waiver of a forfeiture may occur simply because other persons, members of the order, had engaged in like occupation with the decedent, with knowledge of appellant and decedent, and that appellant had not taken any action to suspend or expel them. We can not approve this instruction as a correct statement of the law, but under the undisputed facts in the case, we are clearly of the opinion that as appellee was entitled to recover the jury were not misled by it. In such case, an erroneous instruction will be regarded harmless. *Van Vleck v. Thomas*, 9 Ind. App. 83; *Chicago, etc., R. Co. v. Butler*, 10 Ind. App. 244.

Other instructions given by the court of its own motion are complained of by appellant, but we are unable to see anything objectionable in them and do not deem it necessary to take them up *seriatim* and discuss them. Appellant tendered a series of instructions and of these the court refused to give the first, fourth, fifth, sixth, seventh, and ninth, to

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which refusal it excepted. We will notice only those specifically discussed by appellant. By the seventh instruction so requested, the court was asked to say to the jury that the subordinate or local tent in the collection and transmission of assessments and dues from its members is the agent of the members, and that such members agree by becoming members that the supreme tent shall not be liable for any negligence, etc., on the part of the local tent. This instruction was based upon a by-law of appellant embodying the substance of the instruction. It is insisted that the assured and appellee are bound by the by-law and that the local tent is the agent of the member and not of appellant. We can not adopt this view. The only mode provided for the payment of dues and assessments by members of appellant order was to pay them to the local tent or some designated officer thereof; and it is made the duty of the latter to transmit the same to the supreme tent. To this extent at least such subordinate tent or officer is the agent of the supreme tent. In the case of *Supreme Lodge, etc., v. Withers*, 32 C. C. A. 182, 89 Fed. 160, it was held that the officers of a subordinate lodge were the agents of the supreme lodge for the purpose of collecting and forwarding the dues paid by members, although the by-laws of the order provided that they should be the agents of the members in such matters. In the recent case of *Supreme Tribe of Ben Hur v. Hall*, 24 Ind. App. 316, this court decided the same question in harmony with this rule. See, also, *Supreme Council, etc., v. Boyle*, 10 Ind. App. 301; *Supreme Lodge, etc., v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. ed. 163.

By analogous reasoning, it necessarily follows that the subordinate tent or officers being agents of the supreme tent in such matters, the knowledge of such agent is the knowledge of the principal, and the supreme tent is bound thereby. Appellant's counsel complain that the court, in its instructions, has more than once spoken of knowledge of certain facts on the part of appellant when the record

shows that the local tent and its officers only possessed such knowledge. The court was justified in using this language in reference to the business decedent was engaged in, the payment of dues and assessments by him or by some one for him, and knowledge of the local officers of such facts. It follows from what we have said and the authorities, that the court correctly refused to give the seventh instruction.

By the eighth instruction tendered, the court was requested to say to the jury that the by-law declaring that a member shall stand suspended for engaging in any prohibited business was self-executing, and that no action of the supreme tent was necessary to work such suspension. This instruction was correctly refused, for, as we have seen, the by-law must be construed in the light of and in connection with the certificate, which provides that in certain events a member "may be suspended," etc. The ninth instruction embraces the same principle of law and was properly refused. We have now considered all the instructions discussed by counsel.

The eighth reason for a new trial relates to the action of the court in overruling appellant's motion to strike out the testimony of John Graham. This witness was "Deputy Supreme Commander" and his duties were defined by the by-laws. It is unnecessary to set out the evidence of this witness even in the abstract. We have examined it with care and are unable to see that the evidence in any manner prejudiced the appellant, and while some parts of it may not have been legitimate and strictly within the issues, there was no reversible error in overruling the motion to strike it out.

The verdict is sustained by the evidence and is neither contrary to the law nor the evidence. A correct and just conclusion seems to have been reached upon the merits of the case, and there is no prejudicial error for which the judgment should be reversed.

Judgment affirmed.

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RAZOR, ADMINISTRATOR, v. MEHL, ADMINISTRATOR.

[No. 8,106. Filed April 17, 1900. Rehearing denied Nov. 27, 1900.]

EXECUTORS AND ADMINISTRATORS.—*Letters of Administration Issued in Wrong County.*—Letters of administration issued in a county where property of decedent was situate, but other than the county in which decedent maintained his domicile at the time of his death, are not void but voidable only. *p. 646.*

SAME.—*Letters of Administration.—Revocation.*—Letters of administration issued in the county of which decedent was an inhabitant at the time of his death confer no authority to the one to whom they are issued to institute proceedings to revoke letters previously issued in another county. *pp. 646, 647.*

From the Elkhart Circuit Court. *Affirmed.*

L. W. Vail, S. J. North and E. D. Salsbury, for appellant.

E. A. Dausman, for appellee.

COMSTOCK, J.—The petition in this cause alleges that John L. McPherson died intestate on the 30th day of November, 1898, at Kosciusko county, Indiana, of which county he had been an inhabitant since “his removal to said county in the month of September, 1898, from Elkhart county”; that the petitioner was, on the 16th day of January, 1899, appointed administrator of said decedent’s estate by the Kosciusko Circuit Court; that decedent, at the time of his death, was the owner of a farm and some personal property situate in Elkhart county; that on the 12th day of December, 1898, Abraham C. Mehl (appellee) “was duly appointed by the Elkhart Circuit Court administrator of the estate of the decedent, all of which is in the possession of said Mehl.” The petitioner asks that Mehl be removed from his trust, and that he be required to turn over to the appellant said property, upon the ground that the Elkhart Circuit Court had no jurisdiction to make the appointment. To this petition the court sustained a demurrer for want of facts. Appellant declining to plead

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further, the court adjudged appellee to be the legal administrator. The ruling of the court upon the demurrer is the only error assigned upon this appeal.

The statute provides that after the death of an intestate letters of administration shall be granted in the county, first, where at his death the intestate was an inhabitant. §§2380, 2381 Burns 1894, §§2227, 2228 Horner 1897.

It appears from the petition that the decedent was an inhabitant of Kosciusko county at the time of his death. It appears, also, that before the time of twenty days within which, under the statute, letters of administration are to be issued to certain persons in the order named upon application, appellee was appointed administrator by the Elkhart Circuit Court. Authority to grant letters of administration is wholly statutory. *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477; *Croxton v. Renner*, 103 Ind. 223.

From the averments of the petition, the court was without jurisdiction to appoint appellee. "When it is shown there was no jurisdiction, the decedent being domiciled at the time of his death in another county * * *. It is the duty of the court, upon application of any party in interest or even *ex mero motu* to annul or revoke letters granted." It has been decided, however, that letters issued in the wrong county of the state of which the decedent was an inhabitant at the time of his death are not void, but voidable only. Woerner's American Law of Administrators, §268. Rice's American Probate law and Practice, 337.

The circuit courts of Elkhart and Kosciusko counties had concurrent probate jurisdiction. Elkhart county having first assumed jurisdiction in the case before us, it retained exclusive jurisdiction until its action was set aside. It follows that the issuance of letters in Elkhart county was valid until revoked; and as there can not be two valid administrations within this State upon the same estate, the administration in Kosciusko county was void. The

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grant of letters to appellant conferred no authority nor interest which authorized him to institute this proceeding to revoke the letters issued to the appellee. *Coltart v. Allen*, 40 Ala. 155. See, also, *Cunningham v. Tully*, 154 Ind. 270.

Appellee has not filed a brief, but we presume that this was the view taken by the trial court. Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIUM.—In overruling the petition for a rehearing in this cause, we deem it proper to add that the only question presented by the appeal is the sufficiency of the complaint. While it is therein averred that the decedent was at the time of his death an inhabitant of Kosciusko county, the contents of the record are not shown. The only record properly here consists of the complaint, the demurrer and the ruling and judgment of the court thereon. It does not therefore affirmatively appear, as claimed by counsel for the appellant, that the action of the Elkhart Circuit Court is void.

Petition for a rehearing overruled.

THE LAFOLLETTE COAL AND IRON COMPANY ET AL.
v. THE WHITING FOUNDRY EQUIPMENT COMPANY.

[No. 8,109. Filed May 18, 1900. Rehearing denied Nov. 27, 1900.]

BILLS AND NOTES.—*Action Against Indorsers.—Special Finding.*—In an action on a negotiable promissory note, a judgment against indorsers cannot be sustained on special findings which show no demand on the maker for payment, and no notice to the indorsers of non-payment, and no waiver of such demand and notice.

From the Boone Circuit Court. *Reversed.*

S. R. Artman and *J. C. Perkins*, for appellants.

C. M. Zion, for appellee.

WILEY, C. J.—The only question presented for decision by the assignment of errors is the correctness of the conclu-

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sions of law stated by the court upon the facts specially found. A statement of the pleadings is unnecessary. The special finding of facts and the conclusions of law are as follows: "That the plaintiff is a corporation organized and doing business under the laws of the state of Illinois; that on the 4th day of December, 1895, the defendant, Millard W. Simmons, executed his certain promissory note to the order of the LaFollette Coal and Iron Company, due five months after date, for \$2,625, payable at the Plymouth State Bank, at Plymouth, in the State of Indiana, for value received and interest at six per cent. per annum until paid, which note is in the words and figures following, to wit: '\$2,625. Plymouth, Ind., Dec. 4, 1895. Five months after date I promise to pay to the order of the LaFollette Coal and Iron Company, \$2,625, at Plymouth State Bank, Plymouth, Ind. Value received with interest at six per cent. . . . No. . . . Due. . . . M. W. Simmons.' That afterwards, and before the maturity thereof, the defendant, the LaFollette Coal and Iron Company, indorsed said note in writing on the back thereof, by Harvey M. LaFollette, its president, to one F. C. Helm, which indorsement is in these words, 'LaFollette Coal and Iron Co., by Harvey M. LaFollette, Pres.' That afterwards, and before the maturity thereof, the defendant, Harvey M. LaFollette, and the said F. C. Helm, by their written indorsement on the back thereof, indorsed said note to the plaintiff herein, which indorsements are in these words, 'Harvey M. LaFollette,' 'F. C. Helm.' That the plaintiff is now the holder and owner of said note. That said note has credit thereon as follows: '\$67.81 as interest to date paid on this note May 7, 1896.' '\$500 paid on this note May 7, 1896.' That said note is past due, and except said credits, is wholly unpaid. That there is now due on said note \$2,450.83.

"Upon the foregoing facts the court makes the following conclusions of law: (1) That plaintiff is entitled to recover of and from the defendant, Millard W. Simmons, as maker

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of said note, and from the defendants, LaFollette Coal and Iron Company and Harvey M. LaFollette as indorsers of said note the sum of \$2,450.83, and to bear six per cent. interest from date, with all costs herein, taxed at dollars and cents.”

From the findings it will seem that notice of demand for payment and notice of non-payment are not waived in the note, either by the maker or the indorsers. As to whether there was any demand for payment, or that the indorsers were notified of the non-payment of the note, the special findings are silent. Appellants rely for a reversal upon this proposition: That there being no demand upon the maker of the note, and no notice to them of its non-payment, and these facts not being found in the special findings, they are discharged as indorsers. The note sued on is payable at a bank in this State, and is therefore negotiable as an inland bill of exchange within the express terms of the statute. §5506 Horner 1897.

Appellants, nor either of them, were liable as makers, and, if liable at all, were only liable as indorsers. If liable as indorsers, failure to give notice of non-payment is equivalent to a discharge. *DePauw v. Bank, etc.*, 126 Ind. 553, 10 L. R. A. 46; *Bronson v. Alexander*, 48 Ind. 244; *Green v. Louthain*, 49 Ind. 139; *Hoffman v. Hollingsworth*, 10 Ind. App. 353.

To hold appellants liable as indorsers, it was necessary to aver and prove a demand on the maker, and that in default of payment appellants were notified thereof. This appellee has not done, and, under all the authorities, appellants were not liable. It follows that the court erred in its conclusions of law.

The judgment is reversed, and the court below is directed to restate its conclusions of law and to render judgment in consonance with the foregoing opinion.

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BASS, RECEIVER, v. REITDORF.

[No. 3,237. Filed Oct. 5, 1900. Rehearing denied Nov. 27, 1900.]

NEGLIGENCE.—In Construction of Swimming Pool at Public Park.—Action for Death.—Complaint.—In an action by a parent for the death of a son, the complaint alleged that a railroad company, for which the defendant was acting as receiver, owned and operated for profit a park; that located in the park was a body of water held out to the public as a suitable place for bathing, swimming, and diving; that defendant had negligently left concealed under the surface of the water certain timbers; that plaintiff's son, desiring to bathe in the water thus provided, and, being ignorant of the concealed timbers, leaped head foremost into the water, striking the timbers, sustaining injuries from which death resulted; that the defendant was conducting the business of the park under the order and direction of the court. *Held*, that the complaint stated a good cause of action. *pp.* 650-652.

SAME.—Contributory Negligence.—The receiver of a railroad company was operating for profit a public park owned by such company, in which park there was a body of water held out to the public as a suitable place for bathing. A plank walk with rope barriers about three feet high was thrown around a portion of the bathing place, forming an inclosed pool. Notices were posted in conspicuous places in the adjoining bath-house as follows: "Bathers who are not good swimmers must not go outside of the pool. Good swimmers do so at their own risk." A boy sixteen and one-half years old, able to read the English language, an active diver and swimmer, stood on the walk and dived over the guard rope into the water outside the pool. His body came in contact with obstructions concealed beneath the water, and unknown to him. *Held*, that the boy was guilty of such contributory negligence as to bar a recovery for his death resulting therefrom. *pp.* 652-654.

From the DeKalb Circuit Court. *Reversed.**J. M. Barrett* and *S. L. Morris*, for appellant.*L. M. Ninde, D. B. Ninde, H. W. Ninde, L. J. Ninde, F. S. Roby* and *S. A. Harper*, for appellee.

ROBINSON, C. J.—Suit for damages for the negligent killing of appellee's son. Demurrer to complaint overruled. Answer of general denial. Trial by jury, verdict in appel-

lee's favor and answers to special interrogatories. Motion by appellant for judgment on the answers overruled. Judgment. The errors assigned question the sufficiency of the complaint, and the legality of denying appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict.

The complaint avers that the Fort Wayne Consolidated Railway Company owned and managed divers lines of road and also a large park on the St. Joseph river, which park was constructed and managed by the company for profit, and to which it operated a branch of its road; that a receiver was appointed by the court and took possession of the company's property including the park and branch line leading thereto, and under order of the court proceeded to operate the road and carry on and conduct the business of the park as a place of common resort for pleasure for the people; that located in the park and as a part of the river was a body of water held out to the public as a suitable and safe place for bathing, swimming, and diving; that appellants had failed and neglected to remove from this body of water certain pieces of timber, stumps, and logs, but left the same concealed therein under the surface of the water and which were out of sight and unknown to appellee's son; that on a day named appellee's son went upon the planks and appliances along the water, prepared and maintained by appellants for the accomodation of persons engaged in bathing, swimming, and diving, being ignorant of the dangerous logs, stumps, etc., and as was the custom in such exercises, in the usual and ordinary way, leaped head foremost into the water striking such logs, stumps, etc., resulting in his death. The objections to the complaint are involved in the denial of the motion for judgment on the answers to interrogatories and all may be considered together.

It appears from the special answers that in April, 1897, one Phillips and appellant, receiver, entered into an agreement whereby Phillips erected and conducted at his own

expense a bath-house and float pool in the park for the purpose of giving swimming lessons; the float and pool to be constructed and maintained according to plans submitted by appellant. A stipulated scale of prices to be charged was set out, appellant furnished a ticket seller at its own expense, and paid over to Phillips weekly eighty-five per cent. of the proceeds and retained the other fifteen per cent.

It is argued that as the special answers show the pool was in the exclusive possession of Phillips, there can be no liability on the part of appellant. Upon this question the answers conflict, one saying that Phillips had exclusive control, and another that the pool was maintained by appellant in connection with Phillips. The answers very clearly show that there was a contract relation between appellant and Phillips, and that each was to derive his reward from the profits of the business as such. The proceeds, whether much or little, and which were to be divided in a certain way, constituted the only source of profit or compensation to either party. In the prosecution of the common enterprise each was the other's agent and as to third persons each was liable for the other's omissions or faults. *Stroher v. Elting*, 97 N. Y. 102.

The complaint avers that the receiver took charge of the park upon the order of the circuit court and conducted the business of the park under the order and direction of the court. The general verdict finds these averments to be true and there is nothing in the answers in conflict with that finding. Were this a suit upon an executory contract made with a receiver the rule declared in *Brunner v. Central Glass Co.*, 18 Ind. App. 174, would apply.

It is further argued that the special answers show that the decedent was guilty of contributory negligence. The float pool was forty by twenty feet and was surrounded by a board walk along the outside of which were stretched ropes about three feet high. The ropes were not for the purpose of requiring bathers and swimmers to stay inside of the pool

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and defining the line of the pool but to protect small boys from falling into deep water. Posted in the rooms of the bath-house, where it could be easily read, and in a number of conspicuous places about the pool and where they could be seen, were notices to the effect, among other things, that "bathers who are not good swimmers must not go outside the pool; good swimmers do so at their own risk"; there were forty-eight of these notices, one of which was in the room of the bath-house used by decedent. Decedent, sixteen and a half years old, active and strong, able to read the English language, an experienced swimmer and diver, having bought a ticket and rented a bathing suit, stood on the walk and dived over the guard rope into the river on the outside of the pool. He had had his attention called to obstructions which he thereafter avoided, but was injured by coming in contact with an obstruction other than any to which his attention had been called and of whose existence he did not know; he had never encountered the obstruction in diving prior to that time; before diving he did not know there were obstructions in the river at that place; objects in the bottom of the river at that point, which was five to six feet deep, could not be seen because of the muddy water; the obstruction which caused decedent's death was not visible or discoverable without diving into the river and could not have been seen by looking at or into the water.

The general verdict finds that the place where the injury occurred was held out by appellant as a suitable place for bathing, swimming, and diving. There is no direct averment that the place was generally used by the public for these purposes. Even conceding it might have been shown under the issues formed and thus be held to be found by the general verdict as against special answers, that the place was habitually used by patrons of the park, with appellant's knowledge, prior and up to the time of the injury, that would not be equivalent to a finding that the notice was disregarded and abandoned by appellant. It is true there is a

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finding that there was no evidence that the notice could be easily seen and read by persons desiring to swim in the swimming pool. This does not necessarily negative the finding that notices were posted in each room of the bath-house where they could be easily read and that there was such a notice in the room decedent used. The findings clearly show that notices were so posted, that decedent must have seen them had he looked. The fact that appellant gave such notice negatives the averment of the complaint found as a fact by the general verdict that appellant held the place out to the public as a suitable place for bathing and swimming. The notice was to all classes of persons. For some reason, undisclosed by the notice, it was not considered a safe place for any one to go. Persons who were not good swimmers were told they must not go outside the pool, and persons who were good swimmers were told that if they did go outside the pool they did so at their own risk. Appellant's motion for judgment should have been sustained.

Judgment reversed, with instructions to sustain appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict.

BODELL v. THE BRAZIL BLOCK COAL COMPANY.

[No. 2,901. Filed December 11, 1900.]

PLEADING.—Master and Servant.—Personal Injuries.—Defective Appliances.—Where in an action for personal injuries to an employe caused by defective appliances it is shown by the complaint that the defect was open and obvious, and it is not shown that the complaining party had no opportunity to observe it, an averment of want of knowledge is insufficient. pp. 655, 656.

NEGLIGENCE.—Violation of Statutory Duty.—Contributory Negligence.—Damages.—Master and Servant.—In an action by a coal mine employe for personal injuries caused by a breach of the statutory provision requiring the cages used in mines to be securely covered, the mere fact that there was a violation of a statutory duty does not relieve plaintiff from showing that he exercised due care. pp. 656, 657.

SAME.—Violation of Statutory Duty.—Action.—Mines.—Damages.—Master and Servant.—An action may be maintained for injuries

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sustained by a coal mine employe caused by the failure of the company to keep cage used in mine securely covered as required by §7469 Burns 1894, although the employe was not ascending or descending the shaft when injured. pp. 657-662.

From the Clay Circuit Court. *Affirmed.*

E. S. Holliday, F. A. Horner and J. A. Smith, for appellant.

G. A. Knight, for appellee.

ROBINSON, J.—Appellant's complaint avers that he was employed by appellee corporation as a "cager" in its mine, in which more than ten men were employed; that it was appellant's duty to pull the empty cars from the cage or elevator at the bottom of the shaft where he was stationed, and push the loaded cars upon the cage to be hoisted to the top; that these carriages or cages were also used for lowering and hoisting persons into and out of the mines; that it was appellee's duty to provide a sufficient covering overhead for these cages to prevent injury to persons ascending and descending upon such cages and to prevent injury to persons engaged in loading and unloading the same at the bottom of the mine; that the place where appellee was working was far underground and dimly lighted; that it required all his strength and the concentration of all his faculties to place properly a loaded car in position upon the cage; that his duty required him to watch closely the car he was thus pushing upon the cage and while thus engaged he believed and rested in the belief that appellee had provided a covering for the cage and had no notice or knowledge to the contrary; that appellee had not provided a sufficient covering in this, that the covering for the cage did not project to the sides of the cage, but a large portion of the cage was left uncovered, all of which appellee knew or might have known by reasonable diligence; that in pushing the loaded car upon the cage it was necessary for appellant to place his hands upon the top of the rear end of the car; that just as he had placed the car on the cage and while engaged in

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putting it in position, and while his hands were upon the car where they would have been protected had the top of the cage been covered, a large lump of coal fell from the top of the shaft and because of no covering upon the top of the cage struck appellant's hand whereby he was injured; that the injuries occurred without appellant's fault, but by reason of the above mentioned negligence of appellee. Sustaining a demurrer to this complaint is assigned as error.

The rule is well settled that if a defect in an appliance is open and obvious alike to the master and the servant, and the servant voluntarily continues in the service, the risk of an injury from such defect is his own. He can assume the risk of a latent danger only when he knows of it. But where the defect is open and obvious and the complaining party does not show that he had no opportunity to observe it, an averment of the want of knowledge is not enough. If he could have seen an open and apparent defect by looking, the law requires that he shall look. He can not fail or refuse to use his eyes and then be heard to say that he did not know. The test is, not whether he did comprehend the danger, but whether he ought to have comprehended it, and he is chargeable with a knowledge of such dangers as he might have known by exercising ordinary care. If the defect or danger is open and obvious, though it exists through the employer's negligence, an employe of mature years will be presumed to have knowledge of it, and though the employer may have been negligent in the matter, the employe is also guilty of negligence in accepting or continuing in the service, and this becomes equivalent to contributory negligence which prevents a recovery. *Hoosier Stone Co. v. McCain*, 133 Ind. 231; *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156; *Ames v. Lake Shore, etc., R. Co.*, 135 Ind. 363; *Sheets v. Chicago, etc., R. Co.*, 139 Ind. 682; *Salem-Bedford Stone Co. v. Hobbs*, 144 Ind. 146; *Peerless Stone Co. v. Wray*, 143 Ind. 574.

But it is argued that under what is known as the coal

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mining statute the doctrine of assumption of the risk or of contributory negligence does not apply; that where a person is injured through a breach of statutory duty imposed, the doctrine of assumption of the risk does not apply, and that where a servant continues in the employment with the knowledge of such a breach of such duty and is injured, he may recover for such injury. The mere fact that there has been a violation of a statutory duty does not relieve the injured party from exercising due care. The failure of a railroad company to observe its statutory duty and as an engine approaches a crossing sound the whistle or ring the bell, does not excuse the traveler from exercising care as he approaches a crossing. *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576, and cases cited.

Section 9 of the act of June 3, 1891, §7469 Burns 1894, §5480j Horner 1897, provides: "That the owner, operator, agent, or lessee shall cover the cages with one-fourth (1-4) inch boiler plate, so as to keep safe as far as possible persons descending into and ascending out of such shaft, and no person shall descend any shaft when coal is ascending on the other cage." Section 7483 Burns 1894, §5480y Horner 1897, provides a penalty for the violation of any of the provisions of any action of the act. Section 7473 Burns 1894, §5480n Horner 1897, reads: "That for any injury to person or persons or property occasioned by any violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby."

We can not agree with counsel that because appellant was not ascending or descending the shaft and had not gone into the cage for that purpose, that he could have no right of action under the statute. The strict letter of these sections might thus limit their application. But the manifest intention of the whole act is to protect persons working in coal

mines. It is a familiar rule that that which was within the intention of the legislature is within the statute although not strictly within its letter. The general scope of the whole statute is not limited to protecting persons only when going up or down the shaft. When the above sections were enacted the legislature, as shown by the scope and title of the act, was considering the question of regulating the working of coal mines, the weighing of coal, providing for the safety of employes, protecting persons and property injured. See Acts 1879, p. 19; Acts 1891, p. 57. Applying the well known rules for the interpretation of statutes we can not escape the conclusion that a person working in the cage at the bottom of the shaft is as much within the reason and intention of the statute as he is when going in and out of the mine.

The Illinois and Missouri statutes, under which the cases of *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, and *Durant v. Lexington Coal Co.*, 97 Mo. 62, 10 S. W. 484, were decided, contained provisions imposing a duty upon the owners of a mine operated by shaft to provide suitable means of signaling between the bottom and the top thereof, and to provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of the shaft, and requiring the top of each shaft and the entrance to each intermediate working vein to be fenced by gates. And both statutes contain this provision: "For any injury to person or property, occasioned by any wilful violation of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby." Laws Mo. 1881, p. 170; R. S. Ill. 1874, p. 708.

In the Missouri case counsel had argued that knowledge on the part of the injured party that the cage was not covered with iron, and that no contrivance had been provided for signaling from top to bottom, and that the top of the

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shaft had no gates or other protection, should defeat the action. In answer to this the court said: "Such a declaration of law would in effect nullify the statute. Knowledge only by the plaintiff of the failure of the defendant to have the mine provided with these protections will not defeat the action. It must be remembered that the plaintiff, to prevail, must show a wilful violation or failure to comply with the statutory regulations. Our statute seems to be the same as that of Illinois, and it has been held there that, though the injured person may not have been entirely free from fault, still if the jury found that the wilful conduct of defendant resulted in injury, the verdict would be justified. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590. But we do not say in this case that plaintiff could recover if guilty of negligence himself. There is evidence in this case that plaintiff was out of his place when in the cage, and that he should have pushed the pit car into the cage. On the other hand, there is evidence that he had direction from the pit boss to pull the car in, and that he had been provided with hooks to do the work as he did, and that he was not negligent. Whether he was guilty of negligence contributing to the injury was submitted to the jury on various instructions favorable to defendant." In the Illinois case the court used this language: "Where an action is brought to recover for an injury resulting from the negligence of another, which was not wanton or wilful, it is an essential element to a recovery that the plaintiff or party injured must have exercised ordinary care to avoid the injury, but, as we understand the authorities, where the injury has been wilfully inflicted an action may be maintained, although the plaintiff or party injured may not have been free from negligence." In that case the jury was instructed that if they believed from the evidence that decedent did not exercise due care and that his death would not have happened but for his own negligence they should find for the defendant. "Nor," said the court, "does the evidence justify the theory that the misconduct of the decedent materially contributed to the injury."

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It is thus seen that under the Illinois and Missouri statutes an action did not lie unless there had been a wilful violation of the act or a wilful failure to comply with some of its provisions. Yet these amount to negligence only. To say that an injury resulted from a wilful failure to do a duty is not saying that the injury was wilfully inflicted. The Indiana statute gives a right of action for an injury occasioned by any violation of the act, and also for an injury occasioned by the wilful failure to comply with the act. Each means negligence only. While there can be no such thing as wilful negligence, *Miller v. Miller*, 17 Ind. App. 605, yet there may be degrees in negligence. *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286. But whether negligence be slight, ordinary, or gross, it is still negligence, and if the defendant is simply charged with negligence, contributory negligence is a defense. The complaint in the case at bar seeks redress for a negligent omission of duty and not for an injury wilfully inflicted.

In *Island Coal Co. v. Greenwood*, 151 Ind. 476, it was held, in an action under this statute, that where the employe had an opportunity equal with that of the company to ascertain the danger of coal falling from the roof of the place where the employe was working, there could be no recovery. Such a case was held to be not unlike the caving in of a gravel pit which has been held a danger alike open to the observation of employer and employe, citing, *Vincennes, etc., Co. v. White*, 124 Ind. 376; *Swanson v. City of Lafayette*, 134 Ind. 625.

The case of *Island Coal Co. v. Sherwood*, 153 Ind. 699 was reversed upon the authority of *Island Coal Co. v. Greenwood*, *supra*, and the following cases cited: *Victor Coal Co. v. Muir*, 20 Col. 320, 38 Pac. 378, 46 Am. St. 299; and *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 49 Am. Rep. 935, 32 S. W. 460.

In *Queen v. Dayton Coal Co.*, *supra*, it was held that the employment of an infant in a mine in violation of a statute

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making such employment a misdemeanor was negligence *per se*, and that in an action for injuries sustained in such employment contributory negligence is available as a defense.

In *Victor Coal Co. v. Muir, supra*, appellee was injured by a rock falling from the roof of a mine where he was working. A statute of that state, in many respects similar to the Indiana statute, made it the duty of the owner of a coal mine to employ a mining boss whose duty, among other things, was to see that all loose coal, slate and rock overhead were carefully secured against falling in or upon the traveling ways, made it a misdemeanor for any person wilfully to neglect or refuse securely to prop the roof of any working place under his control, and provided: "For any injury to person or property occasioned by any violation of this act, or any wilful failure to comply with its provisions by any owner or lessee or operator, of any coal mine or opening, a right of action against the party at fault shall accrue to the party injured for the direct damages sustained thereby." It was held that contributory negligence was a bar to appellee's action.

It will be noticed that the sections of the Colorado and Indiana statutes giving the right of action are in substance identical. Although the court in the Colorado case has construed the expression a "wilful failure to comply with the act" to mean wilful negligence, yet the opinion rests upon the injured party's right to maintain the action because of the company's negligence and not because of an injury wilfully inflicted.

It is true the statute, §7473, *supra*, gives a right of action to the person injured. But this right would have existed by virtue of the common law and independently of that section. Neither that section nor the rest of the act undertakes to say what the suitor shall do or what he shall be excused from doing in order that he may maintain the action. When the act was passed, the doctrine of contributory negligence and assumption of the risk was established

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through repeated decisions of the courts. There is nothing in the act which shows in any way that the purpose of the legislature was to change that doctrine. Under the act the company's negligence is made out by showing the violation of the statute. It says nothing about the fault, if any, of the injured party. There is nothing in the act that indicates that the legislature intended the injured party might recover for the company's negligence although himself at fault. We can not read this into the statute. If there is nothing in the statute which manifestly requires a different construction it must be construed according to common law principles. As we construe the statute, it conferred no special right of action in terms. It simply makes the failure to comply with the provisions of the act, whether a negligent failure or a wilful failure, an act of negligence *per se* on the part of the mine owner, agent, or operator. As such the contributory negligence of the party suing is available as a defense.

As the defect in the covering of the cage was open and obvious and one which could be readily seen by appellant had he looked, we must conclude from the averments of the complaint that the risk of danger from falling coal was assumed by appellant. The demurrer was properly sustained.

Judgment affirmed.

THE BECK AND PAULI LITHOGRAPHING COMPANY v.
THE EVANSVILLE BREWING COMPANY ET AL.

[No. 8,223. Filed December 11, 1900.]

CONTRACTS.—*Construction*.—A contract "for five M., each, letter-heads, 8½ x 11, business cards, envelopes, statements, at twelve dollars per M., and hangers * * * at 22c. each," is construed as a matter of law to be a contract for the purchase of 5,000 hangers at 22c. each, as well as for 5,000 each of letter-heads, cards, envelopes and statements at twelve dollars per thousand. *pp.* 663-669.

SAME.—*Construction*.—A contract is only to be construed most strongly against the moving party when it will equally admit of two or more interpretations. *p.* 669.

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From the Posey Circuit Court. *Reversed.*

G. V. Menzies, Tarrant, Kronshage, McGovern & Dielmann, for appellant.

J. W. Spencer and J. R. Brill, for appellees.

WILEY, J.—Appellant was plaintiff and sued upon the following instrument: “Evansville Ind., Mch. 13 '91., Evansville Brwg. Co. Dear Sirs. We will submit to you designs for your stationery including design for cut of building also calendar sketch for Gambrinus hanger as per pencil rough shown you, all to be lithographed in first class style, and proofs submitted. Will furnish you 5 M. each, letter-heads 8½ x 11, business cards, envelopes, statements at \$12 pr. M., and hangers on chromo plate paper tinned top & bottom with trade mark and proper wording at 22c. each. No extra charge to be made for sketches and same to be to your satisfaction before proceeding with work.

“Stationery to be in gilt red & black. Hangers to be delivered by June 10, 1891. Yours truly, Beck & Pauli Lith. Co. pr Saville Johnston. Accepted. Evansville Brewing Co, H. Wimberg, Pres.”

The pleadings in the case are voluminous, but no question is presented affecting them, and no useful purpose will be subserved by a further reference to them. It is conceded that the judgment rests upon the first paragraph of complaint. The case was tried before a jury, and, under an instruction by which the court construed the contract, the jury returned a verdict for appellant for \$514.65. Appellant's motion for a new trial was overruled, and such ruling is challenged by the assignment of errors. The decision of the questions involved depends upon the construction of the contract sued on. The court, on its own motion, gave instruction number one, and this was the only instruction given. Appellant tendered three instructions, which the court refused to give. The appellant introduced in evidence the contract sued on, and called as a witness the president of the appellee brewing company, Mr. Wimberg.

This witness testified that the brewing company received all the stationery mentioned in the contract, consisting of letter-heads, statements, business cards and envelopes being 5,000 of each. That at the time the stationery was shipped to the company, 200 "Gambrinus hangers" were also shipped; that the company received the stationery at \$12 per 1,000; that soon after 300 more "hangers" were received, and subsequently the balance of the 5,000 were delivered to the appellee, received by it and stored in its place of business. This witness also testified that the last shipment of hangers had not been used by the appellee. This was all the evidence given in the cause.

The court, in its instruction, construed the contract, and by such construction told the jury that appellee was liable to appellant for the letter-heads, business cards, statements, and envelopes, 5,000 each, and for the first 500 hangers received by it, in the aggregate sum of \$350.50, together with six per cent. interest from August 13, 1891, making a total of \$514.65, for which amount the jury were instructed to return a verdict for appellant, and held, and so told the jury, in effect, that appellee was not liable for the remaining 4,500 hangers. This instruction can not be upheld for at least two reasons: (1) The contract from its terms and the subsequent acts of the parties will not bear the construction placed upon it, and (2) it wholly disregards the fact that appellant received the hangers, stored them away, and made no offer to return them. If it be conceded that the contract is ambiguous, indefinite, and uncertain (and this is stoutly denied by appellant), yet in construing it, the surrounding circumstances and the subsequent conduct of the parties may be resorted to.

In *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527, it was held that, in instructing a jury as to the construction of a writing offered in evidence as a contract, the court should consider surrounding circumstances as well as the language and subject-matter.

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In 11 Am. & Eng. Ency. of Law (1st ed.) 512, it is said: "He who interprets should, as far as possible, put himself in the position of the parties at the time the writing was executed. This is only another way of saying that the intention of the parties should govern. Regard must be given to the occasion which gave rise to it, the relative position of the parties, and their obvious designs as to the object to be accomplished. But if the meaning and intention of the parties cannot be ascertained from the language of the instrument, when thus illustrated, it is void for uncertainty. Where there are two interpretations, that one will be followed which is consistent with the conduct of all the parties. In all cases attention must be given to the subject-matter in the light of contemporaneous facts and circumstances."

In *Bement v. Claybrook*, 5 Ind. App. 193, this court, by Black, J., said: "Where the language of a written contract is indefinite, ambiguous, or of doubtful construction, the practical interpretation given it by the parties in acting pursuant to it, is entitled to great, if not controlling, influence in arriving at the true intention." See, also, *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Reissner v. Oxley*, 80 Ind. 580; *Lyles v. Lescher*, 108 Ind. 382; *Gaylord v. City of Lafayette*, 115 Ind. 423; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170.

The work which the contract required the appellant to do was a special work, and the product of its labor and skill was specially adapted to the business in which the appellee was engaged. We know as a matter of common knowledge that lithographing is an art which requires a high degree of skill. Appellant and appellee both knew that the particular work specified in the contract, and the product of that work, could only be done for and used by appellee. The work would possess no value to any one else. Lithographing, which is done by engraving on stone, is an expensive work. The "Gambrinus hangers" mentioned in the contract were to be on "chromo plate paper tinned top and bottom with

trade mark and proper wording." It is evident from the contract itself that this item was the principal one named. Is it reasonable to suppose that appellant would leave this item of the contract, which involved the greatest outlay of money, and which was to be its greatest reward for its skill and labor, in doubt or conjecture? Or, as counsel for appellant aptly say, "is it at all likely that where the price per piece for lithographing work is so entirely dependent upon the quantity of such work to be taken, that the appellant would fix a price twenty-two cents each and leave the quantity at the option of the appellee?" If so, then appellee would have been the sole arbiter of that part of the contract, and could have complied with its terms if it had chosen to accept from appellant but one or 100 of such hangers. The court in its instruction might as well have arbitrarily told the jury that appellee could only be required to pay for one hanger, or the 200 first received, as to have fixed the number at 500. Taking the contract as a whole, and the circumstances under which it was made, we are unable to reach any conclusion other than that a fixed and definite number of hangers was to be furnished and accepted. We will enlarge upon this suggestion further on when we come to construe the contract by its express terms.

Now as to the construction of the contract from the conduct of the parties. There is no doubt as to the construction the appellant put upon it, for it proceeded under the contract to lithograph, tin, etc., 5,000 hangers, according to "*pencil rough shown you*," and when completed, shipped them to appellee. There is no controversy but what the work was done in accordance with the contract, for appellee received and used 500 of them, and received and stored 4,500. After appellee received these hangers, it remained passive and did not do or say anything, so far as the record shows, to even indicate that it placed a different construction on the contract. By its acceptance of the hangers, and its silence, and its failure or offer to return them, the ap-

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pellant had the right to believe that the appellee put the same construction on the contract that it did. ' The goods were delivered to appellee in the summer of 1891, and this action was not commenced until the 8th day of May, 1899, and during all that time appellee retained the hangers, and so far as the record shows never made any complaint about the number. By the acts of the parties as above specified, they construed the contract to provide for 5,000 hangers, i. e., the appellant agreed to lithograph and furnish that number and appellee agreed to accept and pay for that number, and in such case the court will hold them to that construction. *Frazier v. Myers*, 132 Ind. 71; *Toledo, etc., R. Co. v. Burgan*, 9 Ind. App. 604; *Heath v. West*, 68 Ind. 548; *Johnson v. Gibson*, 78 Ind. 282. These are facts which the court may consider in determining the construction that appellee put upon the contract. Because the contract provided for a greater number of "hangers" than the appellee wanted or needed can not be considered. But the contract itself is not indefinite, ambiguous or uncertain. It seems to us that it will bear but one construction. The law forms an important element of every contract, and this element becomes as much a part of the contract as if it was expressly incorporated therein, and it is to be considered in construing the contract. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146. In *Brown v. Brown*, 49 Mass. 573, it was said: "The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usage of the language, are, *prima facie*, matter of law, to be construed and passed upon by the court." Another rule of construction is that words are to be construed in their literal meaning. 11 Am. & Eng. Ency. of Law, 515. With these rules in view, let us look at the language of the contract itself.

The contract includes stationery with cut of buildings, also colored sketch for "Gambrinus hangers as per pencil rough shown you." By the express terms of the contract,

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all these articles are "to be lithographed in first class style and proofs submitted." It provides that appellant "will furnish you" (appellee) "5 M. each, letter-heads, business cards, envelopes, statements at \$12 per M., and hangers on chromo plate paper, tinned top and bottom with trade mark and proper wording at 22 cents each." By this contract, appellant agreed to furnish to appellee 5,000 each of the articles specified, and no other construction, either legal or grammatical, can be put upon it. The word "each," as used in the contract, refers to all the articles named which precede it. In the first paragraph of the contract, the several articles proposed to be furnished are named—the word stationery including "letter-heads, statements, business cards and envelopes." The second paragraph commences with the word "all", which was used and must be construed as referring to the articles named. In the Century Dictionary, the word "each" is thus defined: "Each—being either or any unit of a numerical aggregate consisting of two or three, indefinitely; used in predicating the same thing or both or all the numbers of the pair, aggregate or series mentioned or taken into account, considered individually, or one by one; often followed by 'one', with or before a noun (partitive genitive); as each sex; each side of the river; each stone in the building; each of them has a different course from every other." As a pronoun the definition is given thus: "Every one of any number or numerical aggregate, considered individually; equivalent to the adjectival phrase 'each one'; as each went his way; each had two; each of them was of a different size; that is, from all the others or from every one else in the number." In 10 Am. & Eng. Ency. of Law (2nd ed.), 392, it is said: "'Each' denotes every one of two or more comprising the whole." See, also, *Adams Express Co. v. City of Lexington*, 83 Ky. 657.

There are five articles specified in the contract, the last of which is "hangers." In the second paragraph of the contract they are all mentioned and described in the same sen-

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tence, and the last article named "hangers" is connected with the others by the conjunction "and." The sentence is: "Will furnish you five M. each, letter-heads, 8½ x 11, business cards, envelopes, statements at twelve dollars per M. and 'hangers' * * * at 22c each." The conjunction "and" signifies that the last article "hangers" is to be added to the articles that precede it. It does not seem to us that there can be any confusion or doubt about the meaning of the words used. The sentence just quoted is complete and grammatical. The whole contract, when construed together, is easy to analyze and it can have but one meaning. That meaning being plain and definite, the court must give it effect as it is written. So we must construe the contract, from the language used, to mean just what it seems to us to say, and that is that appellant agreed to furnish 5,000 letter-heads, 5,000 business cards, 5,000 statements and 5,000 envelopes at \$12 per 1,000, and 5,000 hangers at twenty-two cents each.

Counsel for appellee invoke the canon of construction that if the language used in a contract is ambiguous, it must be considered and construed most strongly against the party using it; and that hence the rule should be applied here, for it appears from the contract itself that appellant was the moving party. There is no doubt but what this rule prevails in all cases where it is applicable, but if we concede that appellant was the moving party, the rule would not be applicable, unless we go further and concede that the contract is ambiguous and uncertain. The rule was early announced in this State, and has never been questioned, that a contract is only to be construed most strongly against the grantor or moving party, when it will equally admit of two or more interpretations. *Falley v. Giles*, 29 Ind. 114. This rule is one of *dernier ressort*, and is to be invoked only when all other rules of exposition fail. 2 Blacks. Com. 380. *Adams v. Warner*, 23 Vt. 395. As before said, we do not regard the contract before us as being ambiguous, and hence

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it is not to be construed by the rule to which we have just alluded. The court below put a wrong construction upon the contract, and in its instruction to the jury committed a reversible error.

Judgment reversed, and the court is directed to grant appellant a new trial.

Robinson, J., absent.

BINFORD v. DUKES.

[No. 8,292. Filed December 12, 1900.]

APPEAL AND ERROR.—*New Trial.*—Neither the ground that “a finding and judgment” on a counterclaim is contrary to law, nor that it is contrary to the evidence, is a cause for a new trial recognized by statute. *pp.* 670, 671.

SAME.—*Motions.—How Made Part of Record.*—To make motions to retax costs or to modify the judgment parts of the record by order of court, instead of by bill of exceptions, they must be set out in the order. *p.* 671.

From the Montgomery Circuit Court. *Affirmed.*

Ira M. Sharp, for appellant.

BLACK, J.—The appellant brought suit against the appellee, and among the pleadings filed by the latter was a counterclaim, a demurrer to which was overruled. Though this ruling is assigned as error, no objection to the counterclaim is pointed out. Therefore, this alleged error is waived. The cause was tried by the court, the finding being in favor of the appellant for a portion of the amount of a promissory note declared upon in the complaint, and the court rendered judgment in favor of the appellant for the amount of the finding and for his costs made on the issues joined on the complaint, and adjudged that the appellee recover of the appellant his costs laid out and expended on his counterclaim.

The appellant moved for a new trial of the issue joined on the counterclaim, assigning as the grounds of his motion: (1) Because “the finding and judgment” of the

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court in favor of the appellee on the counterclaim is contrary to law; (2) because "the finding and judgment" of the court in favor of the appellee on the counterclaim "is contrary to the evidence." Neither of these grounds is a cause for a new trial recognized by the statute.

The appellant has assigned as error the overruling of his motion to retax the costs; also, the overruling of his motion to modify the judgment. There is no bill of exceptions in the record, and neither of these motions is contained in an order of court making it a part of the record.

To make such motions parts of the record by order of court, instead of by bill of exceptions, they must be set out in the order. *Close v. Pittsburgh, etc., R. Co.*, 150 Ind. 560.

Judgment affirmed.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. ELWOOD.

[No. 3,011. Filed December 18, 1900.]

MASTER AND SERVANT.—Personal Injuries.—Complaint.—Contributory Negligence.—A complaint against a railroad company by an employe for personal injuries received while coupling cars, by stumbling over rubbish permitted by defendant to accumulate upon the tracks, alleging that plaintiff notified defendant six weeks before the injury to remove the obstruction, and, not being in a position to see the obstructions, believed defendant had removed same, shows actionable negligence on the part of defendant and that plaintiff was without fault contributing to his injury. *pp.* 672-674.

RAILROADS.—Master and Servant.—Voluntary Relief Association.—Personal Injury.—Damages.—Where an employe of a railroad company voluntarily became a member of a relief association conducted by such company, and agreed that if injured he would not seek double compensation by pursuing both the relief fund and his remedy at law against the company, the acceptance of the benefits from the relief fund to which he was entitled for an injury sustained constitutes a bar to an action at law against the company for the injury. *pp.* 674-676.

From the Henry Circuit Court. *Reversed.*

J. L. Rupe and L. P. Newby, for appellant.

WILEY, J.—Appellee sued appellant in a single paragraph, in which it is averred that on May 28, 1893, and for a considerable time prior thereto, appellee was in the employment of appellant as a yard brakeman in its railroad yard at Richmond, Indiana; that as such employe it was the duty of appellee to aid other servants and employes of appellant in said yard in switching and distributing freight cars to and upon the various tracks and switches in said yard, and to make up trains of freight cars to be taken to divers points and places on the lines of appellant's railroad; that to enable appellee to perform and discharge his various duties with safety to himself, it became and was the duty of appellant to keep the surface of its railroad yard, where it was necessary for appellee to go in the discharge of his duties, smooth and free from obstructions and rubbish over which he might stumble and fall; that about 6:30 o'clock on the evening of May 28, 1893, while he was engaged in the discharge of his duties as such employe, and while attempting to uncouple the rear car from the car to which it was attached of several freight cars that were coupled together and attached to an engine, while said cars and engine were moving slowly and without any fault, neglect or carelessness on his part, he stumbled and fell over a large lot of rubbish consisting of pieces of railroad ties, piles of cinders, wood, iron pins, links, couplings, clinkers, and pieces of coke, which appellant had carelessly and negligently deposited and suffered to accumulate on the railroad track and switch between the rails thereof, on which said cars were when appellee was attempting to uncouple said car; that at said time he did not know that said obstructions were on said track. The complaint then avers that appellee saw said obstructions upon the track about six weeks prior to said 28th of May, 1893, at which time he caused appellant "to be notified thereof and to remove the same, and that he never thereafter saw the same and believed that defendant had removed them from said track or switch as the latter

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promised to do.” The complaint then describes how appellee stumbled upon such rubbish and the injury he received. A demurrer to the complaint was overruled. Appellant answered in four paragraphs, one of which was a general denial. The court sustained a demurrer to the second and third paragraphs of answer, and upon the issues tendered by the general denial, the fourth paragraph of answer, and the reply, the case was submitted to a jury for trial, which resulted in a general verdict for appellee for \$2,000. The jury also found specially as to certain facts by way of answers to interrogatories. Appellant’s motions for judgment upon the answers to the interrogatories and for a new trial were respectively overruled. Each of the rulings above noted, which were adverse to appellant, are assigned as errors, and the first question discussed is the overruling of the demurrer to the complaint. The appellee has not filed any brief.

Counsel for appellant argue that the complaint is defective because it shows that appellee assumed the risk incident to the hazardous employment in which he engaged. We need not cite authorities to support the familiar proposition that the master is in duty bound to provide a reasonably safe place for his servant to work. The complaint shows that in this instance the appellant failed to do this. It is certainly negligence for a railroad company to allow rubbish, such as described in the complaint, to accumulate on its tracks and in its yards, and to suffer it to remain there. Especially is this true in a switching yard where the employes are required to go and be in the discharge of their duties in coupling and uncoupling ears, making up trains, etc. We learn from the complaint that the obstructions were on the track and in the yard some six weeks before the accident complained of; that appellant was notified thereof and promised to remove them. Appellee supposed and believed they were removed, and the complaint specifically

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avers that when he was engaged in the line of his duty, and when he was injured, he did not see them. His duty required him to go in between two cars to perform the service incumbent upon him in uncoupling one car from the other, and while so engaged, and while the cars were moving slowly, and he was performing the duty imposed upon him by the terms of his employment, he stumbled on the obstructions and was injured. We know from common observation and knowledge that the distance between two freight cars when coupled together is barely sufficient to permit a man to stand between them. While in that position, it is obvious that he could not see under the cars upon the track, except at his feet, to look for and observe obstructions upon the track. We think from this view of the complaint that it shows actionable negligence on the part of appellant, and that appellee was without fault or negligence contributing to his injury. The court did not err in overruling the demurrer to the complaint.

The next question discussed is the sustaining of appellee's demurrer to the second paragraph of answer. The answer is very voluminous, and is based upon an agreement between appellant and appellee by which the latter became a member of the "Voluntary Relief Department of the Pennsylvania lines west of Pittsburgh." This voluntary relief department consisted of a combination and organization of three separate railroad companies, under the management and control of the Pennsylvania system of railroads west of Pittsburgh. The answer is in all essential respects like a similar answer in the case of *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638. The substance of the answer is that appellee voluntarily became a member of said relief association some time prior to his injury, and was still a member when he was injured; that said department and its funds were managed by the companies embraced in said relief department without expense to the fund; that they guaranteed the payment of all its ob-

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ligations and made up all deficiencies in the fund to meet the payment of all benefits due its members; that said relief department had a set of rules and regulations by which it and its members were governed and to which all persons becoming members assented and agreed to be bound by when they became members thereof; that the employe is entitled to his benefits from any cause—from sickness, from accident, from his own fault as well as from the fault of the company. The answer further shows, based upon the rules and regulations of the company and appellee's written application for membership in the relief department, that if the appellee should become disabled without fault of the company, the living or death benefit may be drawn from the fund without question. If disabled by the fault of the company, he may, after injury, elect whether he will accept the benefits from the fund or pursue his remedy at law against the company. The answer further avers that by the contract between appellant and appellee that if injured by the fault of the company he will not seek double compensation, by pursuing both the relief fund and his remedy at law. It further shows in effect that in case of disability from the fault of the company, and all the facts and conditions are known to the employe, he is at perfect liberty then to choose between the relief fund and the treasury of the company, whether he will accept the sure and immediate benefits from the relief fund, or take his chance in the courts against the company, and that an adoption of one course shall be held an abandonment of the other. The answer further charges that appellee after his injury elected to accept the conditions of his contract providing for the payment to him out of the relief fund the benefits to which he was entitled by the terms thereof, and that the company paid to him and he received and accepted from it, out of said fund, the benefits to which he was entitled from the date of his injury, viz., from May 29th to August 31, 1893.

In the case of *Pittsburgh, etc., R. Co. v. Moore, supra*, the

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Supreme Court, in a very able and exhaustive opinion by Hadley, J., held a similar answer good, and reversed the judgment, holding that it was error of the court below in sustaining a demurrer to the answer. The decision in that case is the law here and must control. It follows that the trial court erred in sustaining the demurrer to the second paragraph of appellant's answer. This conclusion makes it unnecessary to decide other questions presented by the record and discussed by counsel.

The judgment is reversed, with instructions to the court below to overrule appellee's demurrer to the second paragraph of appellant's answer.

Comstock, J., did not participate in the decision of this case.

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[No. 3,283. Filed December 14, 1900.]

ASSIGNMENT FOR BENEFIT OF CREDITORS.—Mortgages.—Instructions not Applicable to Evidence.—An insolvent debtor executed a mortgage on real estate to defendant to secure plaintiff and other creditors whom he wished to prefer, defendant giving due bills to each of the creditors so secured as a memorandum of claim. The next day the debtor made a general assignment for the benefit of creditors, and the assignee, pursuant to an order of court, sold and conveyed the land to defendant. Defendant paid off prior liens, and settled with all of the other creditors, except plaintiff, who refused to accept less than the full amount of his claim and brought suit on the due bill given him by defendant. *Held*, that the court erred in instructing the jury that if they believed that defendant accepted a deed to the land assuming the encumbrances thereon he would be liable for the full amount of plaintiff's debt, where the deed is not in evidence, and there is no evidence that it contained any stipulation for the assumption of the encumbrances by the grantee.

From the Clark Circuit Court. *Reversed.*

G. H. Voight, for appellant.

J. W. Fortune, for appellee.

BLACK, J.—This was an action on a due bill executed by the appellant to the appellee. Issues were formed upon va-

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rious paragraphs of answer in bar and an answer of set-off, and upon trial by jury a general verdict was returned in favor of the appellee for the amount of the due bill, less the amount of the set-off, the appellee in his testimony on the trial having admitted his indebtedness to the appellant in the amount claimed by the latter as a set-off. The appellant's motion for a new trial was overruled, and this is assigned as error.

There was evidence to the effect that one James Colvin, who was insolvent, owned personal property worth about \$150 and a certain farm estimated to be worth about \$1,000, the farm being encumbered by a school fund mortgage for \$300 and a judgment in favor of one John D. Sharp for \$290. Said Colvin executed another mortgage to the appellant as a trustee, to secure twelve of his creditors whom he wished to prefer, to whom he owed in the aggregate \$700, the appellant giving due bills to each of the creditors so secured as memoranda of the amount of Colvin's indebtedness to each, the due bill in suit for \$120.70 being one of them. It did not appear that there was any agreement to release Colvin from his indebtedness to the creditors so secured. The next day after the execution of the last mentioned mortgage, Colvin made a general assignment for the benefit of his creditors to one James E. English, who as such assignee, pursuant to order of court, sold said farm at public auction, and the appellant having bid the sum of \$950 for the farm free of encumbrances, and this being the highest bid, the assignee under order of court conveyed the farm to the appellant subject to encumbrances, no money being received therefor by the assignee. The appellant afterward paid off the school fund mortgage and the judgment above mentioned, and settled with all the preferred creditors, except the appellee, paying to each a *pro rata* portion of his claim upon the assumption that the farm was worth only \$950, the amount so bid therefor by the appellant, and that the preferred creditors were entitled to a *pro rata*

division among them of that amount less the amount of the prior encumbrances so paid off by the appellant. The appellee had refused to settle on such basis and claimed the full amount of the due bill so issued to him by the appellant as trustee.

The court in its instructions, referring to the deed executed under order of court by said assignee to the appellant, stated, that if the jury believed from the evidence that the appellant accepted a deed from said assignee for certain land and the deed recited that the appellant assumed the payment of the encumbrances on the land, and the appellant held a mortgage on the land which was executed to secure appellee's debt, the appellant would be liable for the full amount of appellee's debt; that when a person buys land and assumes the encumbrances thereon as a part of the consideration he becomes individually liable for the payment of such encumbrances; also, that if the appellant accepted a deed from said assignee for the land described in the trust mortgage made to the appellant to secure the appellee's claim, and assumed the encumbrances, according to the recitals of the deed, the jury should find for the appellee the full amount of his due bill with interest from the date of demand, subject to any proper set-off due the appellant.

These instructions were not applicable to the evidence set out in the bill of exceptions as all the evidence given on the trial. The deed executed by the assignee to the appellant does not appear in evidence; all that is shown as to its contents appears to have been shown by parol evidence without objection, and there is no evidence whatever that it contained any stipulation for the assumption of encumbrances by the grantee, but the assignee testified that he was instructed by the court to convey the property to the appellant subject to the encumbrances, without receiving any money from him, and that the witness made a deed in accordance with the order of the court to the appellant.

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There was no evidence in contradiction of this testimony. Thus the trial court seems to have misled the jury by submitting to them a question not within the evidence.

In other instructions the court appears to have intended to submit the case to the jury upon the theory of a conveyance by the assignee to the appellant subject to the encumbrances, and in this connection said that the appellant as a trustee, not having foreclosed the trust mortgage and sold the land at sheriff's sale, could not say what amount it would bring and could not be allowed to say it would not bring enough to pay the preferred claims in full, and he was not in a position to say the claims should not be paid in full. Such instruction was calculated to lead the jury to understand that under the circumstances supposed in the instruction the appellant would be liable to a recovery at law of the full amount of the claims secured by the trust mortgage. There is nothing in the case characterizing it as involving the question of fraud. While under the facts so assumed by the court in the instruction last above mentioned it would be true that the trustee should not be allowed arbitrarily to determine the value of the mortgaged property as between him and the preferred creditors, so, also, they should not be allowed to recover as at law the full amount of their claims, without regard to the value of the mortgaged property, but the remedy of the appellee under such facts would be in equity to enforce the execution of the trust by the methods of a court of equity.

Judgment reversed, and cause remanded for a new trial.

LAKE ERIE AND WESTERN RAILROAD COMPANY v.
TAYLOR.

[No. 8,296. Filed December 14, 1900.]

CARRIERS.—*Railroads.*—*Injury to Passenger.*—*Instruction.*—In an action by a passenger against a railroad company for personal injuries, it is proper to instruct the jury that plaintiff had a right to rely on the company's discharging its duty toward her in providing

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suitable station platforms, and such assistance from trainmen as might be necessary to enable her to alight in safety, the stopping of trains at stations at the proper place, and for a sufficient length of time to enable passengers to alight safely; and if the company is negligent in the discharge of one or all of such duties and plaintiff was injured thereby without any fault on her part, the company is liable for the injuries sustained.

From the Tipton Circuit Court. *Affirmed.*

J. B. Cockrum, George Shirts and W. R. Fertig, for appellant.

T. J. Kane, R. K. Kane, T. E. Kane and R. P. Neal, for appellee.

HENLEY, C. J.—Action by appellee against appellant to recover damages for personal injuries received through the alleged negligence of appellant. The complaint was in three paragraphs. A demurrer for want of sufficient facts was sustained to the first paragraph; the second paragraph was withdrawn. The cause went to trial upon the third paragraph of the complaint. There was a verdict and judgment in favor of appellee. Appellant moved for a new trial, which was overruled. The motion for a new trial calls in question the sufficiency of certain instructions given by the trial court to the jury, and the sufficiency of the evidence to sustain the verdict. These are the only questions discussed by counsel for appellant. It is contended that the following instruction is erroneous: “When a passenger enters the cars of the railroad company for transportation over its road, he or she, in a manner, places his or her person in the custody of the railroad company, and has the right to rely upon the railroad company’s discharging its duty to provide for his or her safety; this duty involves the providing by the company of suitable and proper platforms on which passengers may alight from trains, and such assistance from the trainmen and employes as may be necessary to enable the passenger to alight safely from the train, and the stopping of trains at its stations in a proper place and for a sufficient length of time to enable the passenger to

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alight from the train in safety, and if the company is negligent in failing to discharge all or any one of the foregoing duties, and the passenger is injured by such failure without fault or negligence on his or her part, the company is liable for the injury sustained." We regard this instruction as a correct statement of the law. *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533.

Appellant's counsel do not in fact contend that this instruction is incorrect as an abstract statement of the law, but their contention is that it is not applicable to the evidence and issues in this case. We think, however, that the averments of the third paragraph of the complaint, upon which this cause was tried, are broad enough to justify the giving of this instruction, and we are unable to see in any event how appellant could have been harmed thereby. There was nothing in the instruction which was calculated to mislead the jury. When we have examined the evidence in this cause, we find sufficient evidence to sustain the verdict. The general verdict was a finding in favor of appellee upon all the contested questions, and the evidence being conflicting, the jury had a right to determine the disputed questions of fact.

We find no error. Judgment affirmed.

SPRANKLE v. BART.

[No. 3,318. Filed December 14, 1900.]

NEGLIGENCE.—Cleaning Drain.—Damages to Stock on Lands Outside the Line of the Ditch.—That one has the right to go upon the lands of another for the purpose of dredging or cleaning a ditch does not relieve him for acts of negligence committed upon the lands outside the line of the ditch. pp. 683-684.

JUDICIAL NOTICE.—Animals.—Courts will not take judicial notice that coal, free in its constituent parts from poison, would not, if taken into the stomach of animals, have a tendency to produce death. p. 684.

NEGLIGENCE.—Complaint.—Contributory Negligence.—In an action for damages resulting from acts of negligence committed in clean-

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ing a drain, on lands outside the line of the ditch, an allegation in the complaint "that by reason of said careless, negligent, and unlawful acts of said defendant, which were without fault or negligence on plaintiff's part," sufficiently negatives contributory negligence on the part of plaintiff. *p. 684.*

APPEAL AND ERROR.—*When Evidence Not in Record.*—Under the act of March 3, 1899 (Acts 1899, p. 884), the evidence is not properly in the record, where it is not shown that any time was fixed by the court in which the transcript of the evidence was to be filed with the clerk, the clerk does not certify that the certificate of the judge attached is that of the judge, and the certificate of the clerk does not show when the longhand manuscript of the evidence was filed in his office. *pp. 684, 685.*

SAME.—*Instructions.—Presumption.*—It will be presumed on appeal that instructions tendered and refused were refused because they were not tendered in time, where the record does not affirmatively show that they were tendered before the argument was commenced. *p. 686.*

From the Allen Circuit Court. *Affirmed.*

T. E. Ellison, for appellant.

J. M. Barrett and *S. L. Morris*, for appellee.

COMSTOCK, J.—The complaint in this cause in substance alleges that appellee, who was plaintiff below, was at the time of the commencement of this action and for five years prior thereto had been the owner in fee of certain lands situate in Allen county and described in the complaint, through which a certain ditch had been constructed; that appellant on the 25th day of May, 1898, had a contract to clean said ditch, and that while so doing he carelessly, negligently and unlawfully, and without the knowledge or consent of the appellee, placed coal and oil waste upon the appellee's lands, which were then being used for the pasturing of his cattle; that the appellee was pasturing, on said land where the coal and waste was so deposited, his cows and other cattle. That such cattle ate the coal and waste, which caused the death of three of them of the value of \$120; that the coal is a mineral, and the oil waste a substance which cattle will eat, and if eaten has a tendency to and will produce the death of the cattle so eating the same;

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that appellant knew that the cattle were eating the coal, and that the same would cause their death; that two of the cows had young calves, and that their growth was stunted because of the death of their mothers, to the damage of \$10; that he carelessly, negligently, and unlawfully knocked down 110 rods of appellee's fence, without right or permission, and neglected to rebuild or replace the same; that he unlawfully took down and removed a flood-gate crossing the ditch and negligently failed to replace the same, whereby the cattle of the neighbor entered upon the lands and trampled down eighteen acres of appellee's wheat; that by reason of said careless, negligent, and unlawful acts of the appellant, which were without fault or negligence on the appellee's part, appellee was damaged in the sum of \$210. The cause was put at issue and a trial resulted in a verdict and judgment for the appellee in the sum of \$150. With the general verdict the jury returned answers to interrogatories.

The errors assigned are: (1) That the court erred in overruling appellant's motion for a new trial; (2) in overruling appellant's motion for judgment upon the interrogatories; (3) in overruling appellant's demurrer to appellee's complaint.

It is urged against the complaint that it appears therefrom that appellant had the right to go upon appellee's land, and that some power was necessary to propel the dredge; that either wood or coal was necessary as fuel in operating the machinery; that appellant was not a trespasser and he could not be liable because appellee's cows ate his coal.

By reference to the complaint, it will be observed that appellant placed coal and oil waste upon the lands of appellee, used for pasturing his cattle, without and beyond the lines of said ditch. Conceding appellant's right of entry upon the ditch, he would still be liable for his acts of negligence committed upon lands outside the lines of the ditch. Counsel for appellant object to the averment that

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coal is a mineral and oil waste a substance which cattle will eat and which have a tendency to produce the death of the cattle so eating them, and that appellant knew the cows were eating the coal and that the same would cause their death. The objection made to the averments is that coal as used for the firing of dredges is a harmless mineral, is not presumed to be poisonous, and that mere allegations of the complaint can not change its character. The complaint does not allege that coal is poisonous, but that if eaten would have a tendency to produce death. The court can not know judicially that coal or wood, free in their constituent parts from poison, would not, if taken into the stomach of an animal, have a tendency to produce death. But there are other allegations in the complaint, the sufficiency of which is not questioned, to constitute a cause of action, viz.: That appellant knocked down and destroyed without permission 110 rods of appellee's fence and neglected to rebuild or replace the same; that he negligently removed a flood-gate crossing the ditch, being a part of a division fence between the property of appellee and one Branstater, and failed to replace the same, whereby the cattle of said Branstater entered upon the lands of the appellee at the place from which said flood-gate was so removed and trampled upon and damaged growing wheat of the appellee. It is further objected that the complaint does not negative contributory negligence upon the part of the appellee. This allegation is in the following language: "That by reason of said careless, negligent, and unlawful acts of said defendant which were without fault or negligence on plaintiff's part." The complaint was sufficient to withstand a demurrer.

Counsel for appellee object to the consideration of any question except the sufficiency of the complaint attempted to be raised by the assignment of errors, upon the ground that neither the evidence nor the instructions are properly in the record. It is manifest that an attempt has been made to prepare the record under the act concerning the appoint-

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ment of shorthand court reporters, approved March 3, 1899, Acts 1899, p. 384. Section 5 of said act provides: "Whenever, in any cause, such reporter shall be requested to do so, he shall furnish to either party a transcript of all or any part of said proceedings required by him to be taken or noted, including all documentary evidence, and it shall be his duty to furnish the same written in a plain, legible longhand or typewriting as soon after being requested to do so as practicable, and he shall certify that it contains all the evidence given in the cause."

Section 6 of said act is as follows: "The transcript of the evidence so prepared by such reporter shall be filed by him with the clerk of the court wherein said cause is tried, within a time to be fixed by the court trying such cause. The judge of said court shall thereupon attach to the transcript of the evidence so filed by such reporter a certificate that the same is correct and contains all the evidence, and the clerk shall incorporate such transcript of the evidence and the certificate signed by such judge, in the transcript of said cause, and state in his certificate that the same is the transcript of the evidence filed by such reporter, and that the certificate attached is that of the judge, with the date when the same was filed in his office, and said transcript and record, when so prepared, shall be sufficient to present to the consideration of the Supreme or Appellate Court, in the determination of the questions presented to the lower court trying such cause, and the clerk shall receive no fees for that part of the transcript of record containing the evidence."

The act is vague and uncertain in stating "and such transcript and record when so prepared shall be sufficient," etc., and in failing to state what it shall be sufficient to present to the consideration of the court. But treating the act as sufficiently definite for the purpose of determining the questions raised by counsel for appellee, the record before us does not comply with its requirements for the following, among other, reasons: It does not appear that any time

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was fixed by the court in which the transcript of the evidence was to be filed by the reporter with the clerk of the court; the clerk does not certify that the certificate of the judge attached to the transcript of the evidence is that of the judge, with date when the same was filed in his office; the certificate of the clerk does not show when the long-hand manuscript of the evidence was filed in his office, nor when it was incorporated in the bill of exceptions. Under this act, for these reasons, the evidence is not in the record. *Koontz v. Hammond*, 21 Ind. App. 76; *National Bank v. Berry*, 21 Ind. App. 261.

Separate reasons for a new trial are the refusal of the court to give instructions numbered four, five and six respectively requested by appellant. It does not affirmatively appear from the record that these instructions were tendered to the court before the commencement of the argument. It will therefore be presumed that the refusal was upon the ground that they were not tendered in time and were therefore properly refused. *Lofland v. Goben*, 16 Ind. App. 67, and authorities there cited.

It is urged that certain instructions given at the request of appellant are irreconcilably in conflict with certain others given at the request of appellee. To determine the correctness of instructions given would require an examination of the evidence, which is not in the record. The court in the several instructions complained of, announced general propositions of law. It is insisted that between these instructions and others given by the court at the request of appellant in which an attempt is made to apply the law to the evidence, there is irreconcilable conflict. A careful consideration of these instructions in question leads us to the conclusion that the position of appellant's counsel is not tenable. This disposes of all the questions argued; those not discussed are waived.

We find no error for which the judgment should be reversed. Judgment affirmed.

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THE ADVANCE MANUFACTURING COMPANY ET AL. v.
AUCH.

[No. 3,267. Filed December 18, 1900.]

APPEAL.—*Joint Assignment of Errors.*—Where three parties have joined in an appeal by the assignment of joint errors, and have filed a joint brief, it is too late for two of them to say that they decline to join in the appeal of their co-appellant. *p. 690.*

SAME.—*Joint Assignment of Error.*—A joint assignment of error must be good as to all the appellants who join therein, or it will not be good as to any. *pp. 690-692.*

WORK AND LABOR.—*Foreclosure of Laborer's Lien.—Complaint.*—In an action to recover for work and labor performed, and to foreclose a laborer's lien, if the complaint states facts sufficient to support a personal judgment, it will be good against a demurrer, although it may not state facts sufficient to justify a foreclosure of the lien. *pp. 690, 691.*

From the Marion Superior Court. *Affirmed.*

Robert Denny and G. W. McDonald, for appellants.
Joseph Collier, for appellee.

WILEY, J.—Appellee was plaintiff below, and sued appellant and others to recover for work and labor performed for appellant, the Advance Manufacturing Company, and to foreclose a laborer's lien under the statute. The complaint avers that on and for some time prior to November 6, 1896, the said manufacturing company, a corporation, was engaged in manufacturing and selling furniture, etc.; that it owned and used a large amount of machinery, tools, appliances, etc., describing them; that all of said machinery, etc., was located within the buildings and structures constituting the manufacturing plant, and that said buildings, etc., were located upon certain real estate, describing it. The complaint also avers that for two years prior to said 6th of November, 1896, said manufacturing company had been and was hopelessly insolvent; that at no time from June, 1894, to November 6, 1896, or thereafter, was said

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corporation solvent; that on said last named day said corporation executed a general deed of assignment to the appellant Kramer of all its property for the benefit of its creditors; that prior to said assignment, by a contract between said manufacturing company and appellee, which contract was made in 1894, appellee was to perform manual and mechanical labor for said appellant corporation at a fixed and stipulated price per day; that appellee performed all the duties required of him under said contract; that he performed such labor until said company ceased to operate its plant, shortly prior to said assignment; that the last eighteen days' labor so performed by him has not been paid for; that said labor is of the reasonable value of \$37.16, and that by reason thereof said company is indebted to him in said sum, which is due and unpaid. The complaint avers that the Indianapolis Engine Company and appellants Neerman and Kramer each claim to have some interest in, title to, and lien upon the said property of said manufacturing company, but that such interest, title, and lien, if any, is inferior to appellee's lien for work and labor, and that said engine company and appellants Neerman and Kramer are made defendants to answer to their said interests. The prayer of the complaint is for judgment against the Advance Manufacturing Company, that said sum be declared a lien against the said property described; that said property be sold, and out of the proceeds, after the payment of costs, his claim be paid, and that the right, title, and lien of all of said defendants (appellants) be forever barred, etc.

Each of the original defendants answered separately, the answer of Kramer being in two paragraphs, and that of the manufacturing company and Neerman in four paragraphs. A demurrer to the second paragraph of Kramer's answer, and to the second and third paragraphs of Neerman's and the manufacturing company's answers, was overruled, and a separate demurrer to the fourth paragraphs of answer of the last two named appellants was sustained.

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The appellee replied to these several second and third paragraphs of answers in three paragraphs, to the second and third of which separate demurrers were sustained. Upon the issues thus joined, the cause was tried by the court, resulting in a finding and judgment for appellee. The appellants moved separately for a new trial on the ground that the decision was not sustained by sufficient evidence and was contrary to law. This motion was overruled. The assignment of errors is joint, and is as follows: "The appellants say there is manifest error in the judgment and proceedings in this cause in this: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in sustaining the demurrer of appellee to the fourth paragraph of the separate answer of the Advance Manufacturing Company to the amended complaint; (3) the court erred in sustaining the demurrers of appellee to the fourth paragraph of the separate answer of Gustave A. Neerman, trustee, to the amended complaint; (4) the court erred in overruling the motion of the Advance Manufacturing Company for a new trial; (5) the court erred in overruling the motion of Gustave A. Neerman, trustee, for a new trial; (6) the court erred in overruling the motion of Andrew Kramer, assignee of the Advance Manufacturing Company, for a new trial."

The record shows that all of the appellants prayed an appeal in term time, which was granted upon filing an appeal bond. Appellant, the Advance Manufacturing Company, filed an appeal bond, but neither of the other appellants did. The bond filed shows that the manufacturing company appeals from the judgment rendered against it. The appeal bond was filed July 26, 1899, and the record lodged in this court September 22, 1899. The record shows that the assignment of errors was made when the transcript was filed. Appellants' brief was filed November 28, 1899. September 26, 1900, appellants, the Advance Manu-

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facturing Company, and Kramer, assignee, filed an original paper in this court in which they "decline and refuse to join in the appeal of Gustave A. Neerman, trustee, * * * and pray that they may not, in any event, be further considered as appellants or parties to the appeal herein."

It is urged by counsel that this paper disposes of the case so far as the Advance Manufacturing Company and Neerman are concerned. We can not take this view of it, unless we treat the paper as a dismissal of the appeal on their part, and this we can not do. As to the right of one or more co-appellants to dismiss his or their appeal, there is no doubt; but here, after all three appellants have appealed and they all have assigned joint errors and filed a joint brief, it is too late for two of them to say that they decline to join in the appeal of their co-appellant. So we must disregard this declination to join in the appeal, and dispose of the case upon the record as though no such paper had been filed.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action. As we have seen, the assignment of errors is joint, and it is settled by repeated decisions that a joint assignment of error must be good as to all the appellants who join therein or it will not be good as to any. *Sibert v. Copeland*, 146 Ind. 387; *Armstrong v. Dunn*, 143 Ind. 433; *Carr v. Carr*, 137 Ind. 232; *Board, etc., v. Fraser*, 19 Ind. App. 520; *Supreme Council, etc., v. Boyle*, 15 Ind. App. 342; *Shick v. Citizens, etc., Co.*, 15 Ind. App. 329; *Killian v. State*, 15 Ind. App. 261. The complaint is assailed for the first time in this court. The complaint avers that appellee was employed by appellant, the Advance Manufacturing Company, to perform certain manual and mechanical labor for it; that he performed such labor; that it was of a certain value; that the amount claimed was due and unpaid; and a demand is made for judgment in said sum; and that the sum found due be declared a lien, etc. If we concede that

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the complaint is insufficient to enforce a laborer's lien under the provisions of our statute, yet it is sufficient to authorize a personal judgment against appellant manufacturing company, and in such case the complaint would state a cause of action against it, and if it does not state a cause of action against appellants Neerman and Kramer, they can not avail themselves of the insufficiency of the complaint as to them, under the joint assignment of errors. In *Clark v. Maxwell*, 12 Ind. App. 199, this court held that in an action to foreclose a mechanic's lien that if the complaint failed to state facts sufficient to justify a foreclosure of the lien, but did state facts sufficient to support a personal judgment, it would be good even against a demurrer. In *Bertha v. Sparks*, 19 Ind. App. 431, it was held that where enough facts are stated in the complaint to bar another action for the same cause, it will be held sufficient against an attack for the first time in the appellate tribunal. See, also, *Harris v. State*, 123 Ind. 272. Under the authorities cited, the complaint stated a cause of action against appellant manufacturing company. This being true, the joint assignment of error challenging the sufficiency of the complaint is unavailing as to the co-appellants, even if no cause of action is stated against them; and as to whether it does or not, we express no opinion.

The other specifications in the assignment of error seek to have reviewed the action of the court in overruling the separate demurrers to the fourth paragraphs of the separate answers of appellants, the Advance Manufacturing Company and Neerman, and the overruling of the separate motions for a new trial of all the appellants. Where appellants jointly assign error questioning rulings made on separate demurrers, or overruling separate motions for a new trial, such assignment does not present any question for decision.

The second specification of the assignment of errors affects only the Advance Manufacturing Company; the third

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affects only the appellant Neerman; the fourth affects only the appellant manufacturing company; the fifth affects only appellant Neerman, and the sixth affects only appellant Kramer. It has often been held by both this court and the Supreme Court, that a joint assignment of error by several appellants presents no question as to a ruling against one of the appellants, and which constitutes error against one only. *Sparklin v. Wardens, etc.*, 119 Ind. 535; *Arbuckle v. Swim*, 123 Ind. 208; *Walker v. Hill*, 111 Ind. 223; *Orton v. Tilden*, 110 Ind. 131; *Hochstedler v. Hochstedler*, 108 Ind. 506; *Tucker v. Conrad*, 103 Ind. 349; *Hubbard v. Bell*, 4 Ind. App. 180. In the last case, this court, by Black, J., said: "The error assigned must be available in favor of all who join in the assignment. A ruling which does not affect all who jointly assign it as error, will not be considered. A separate error against one of the several appellants is not presented by a joint assignment of all."

As the record comes to us, it does not present any reversible error. Judgment affirmed.

HERITAGE, TREASURER, v. BRONNENBERG.

[No. 3,827. Filed December 18, 1900.]

COUNTIES.—*Action Against Treasurer for Money Owning by County.*—

An action at law cannot be maintained against a certain named person as county treasurer to recover a judgment for money owing by the county.

From the Madison Superior Court. *Reversed.*

M. A. Chipman, S. M. Keltner and E. E. Hendee, for appellant.

J. R. Thornburgh and D. L. Bishopp, for appellee.

ROBINSON, J.—Appellee sued appellant on the following warrant: "No. 1732. Specific payable out of county revenue. \$112.50. Auditor's office, Anderson, Ind., March 18, 1893. Treasurer of Madison county, Indiana. Pay to Fred Bronnenberg the sum of one hundred twelve and

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50-100 dollars, for damages on Martin O'Briant road, as allowed by the commissioners' court of said county at their March term, 1893. This order is drawn subject to all taxes due from the holder. Attest, C. H. Allen Audr. Madison county. Indorsed, Paid April 23, 1894. William Boland."

Appellee avers in his complaint, which is entitled "Frederick Bronnenberg v. Cyrenus F. Heritage, Treasurer of Madison county, Indiana," that the warrant was issued to him, but that on the 23rd day of April, 1894, it was presented for payment by another person who had illegally obtained possession of it and was paid by Boland then treasurer; that in March, 1896, appellant learned that the former treasurer had paid the warrant by mistake to the wrong person, who thereupon paid back the money to appellant which sum is now held by him as treasurer; that appellee is the person named in the warrant, and that he received it from the auditor and receipted therefor September 8, 1899, and on the same day presented it to appellant and payment refused; that appellee has never received any money on the warrant, that he is the owner thereof, and that the same is past due and unpaid. "Wherefore, the plaintiff demands judgment against the defendant for the sum of one hundred twelve and fifty-hundredths (\$112.50) dollars, and for all other relief." The warrant is filed as an exhibit.

A demurrer to the complaint was overruled. Answer in one paragraph to which a demurrer was sustained. Appellant refused to plead further and judgment was rendered, "that the plaintiff recover of the defendant as treasurer of Madison county, Indiana, on warrant No. 1732 dated March 18, 1893, the sum of the amount of said warrant, the sum of one hundred and twelve dollars and fifty cents. It is further considered and adjudged by the court that Madison county, Indiana, be taxed with all costs of this action in the sum of \$....." The rulings of the court on the

demurrers to the complaint and answer are assigned as errors.

This is not a proceeding in mandamus. No writ was prayed and none was issued. None of the formalities observed in invoking this extraordinary power of the court were observed in bringing the action and it is evident that the proceeding was not begun on that theory. Counsel have not argued the case upon that theory. It is manifest from the pleading that the proceeding was intended to be, and is, an ordinary civil action. We have said this much for the reason that were it a proceeding in mandamus appellate jurisdiction would not be in this court. Whether mandate would lie in such a case it is not necessary for us to determine. See *Marks v. Trustees, etc.*, 56 Ind. 288; *Shelby Tp. v. Randles*, 57 Ind. 390; *Wood v. State, ex rel.*, 155 Ind. 1.

As we construe the pleading it is a proceeding to recover a sum of money from a named person as treasurer of the county. The pleading could lead to a judgment only against the person as treasurer and that would be in effect a judgment against the county. No judgment is asked against anyone in his individual capacity. And this seems to have been the view of the trial court as a judgment was rendered against the person as treasurer for the amount of the warrant, and judgment for costs was rendered against the county. If the county owes the appellant he has a remedy to recover the sum owing. But he is not here pursuing that remedy. He cannot recover it in an ordinary action at law against the county treasurer. The county treasurer alone is sued. The county is not made a party. As the pleading seeks to recover a judgment for money owing by the county by suing the county treasurer, the complaint does not state a cause of action.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

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THE BALTES LAND, STONE AND OIL COMPANY v.
SUTTON.

[No. 8,082. Filed June 26, 1900. Rehearing denied Dec. 18, 1900.]

VENDOR AND PURCHASER.—*Contracts.—Assignment.—Liability of Assignee for Purchase Money.*—Plaintiff entered into an agreement with C. to convey to him certain described real estate upon the payment of notes executed for the purchase price, it being provided that upon failure to make any payment the contract should become a lease and the payments made should be applied as rental for the several terms between the times of payment, and that the covenants and agreements should extend to the assigns of the parties. The contract was assigned to defendant, who went into possession of the land, but did not assume the payment of the notes, and continued in possession until default was made in payment. *Held*, that although a liability existed for use and occupation, an action could not be maintained against assignee on the note.

From the Blackford Circuit Court. *Reversed.*

John Cantwell, S. W. Cantwell, L. B. Simmons, R. B. Dteibelbiss, W. Leonard and E. Leonard, for appellant.

J. A. Hindman, for appellee.

ROBINSON, C. J.—Appellee's complaint avers that on June 26, 1895, one Cook by his promissory note, a copy of which is made an exhibit, promised to pay appellee \$500, July 26, 1898, which is due and unpaid; it is further averred that on the same date appellee and Cook entered into a written contract whereby appellee, in consideration of certain payments and the performance of certain covenants by Cook, agreed to convey to Cook in fee simple certain described lands, Cook agreeing to pay appellee \$3,500 as follows: \$500 in thirty days from date of contract; \$500 July 26, 1896; \$500 July 26, 1897; \$500 July 26, 1898; \$500 July 26, 1899; \$500 July 26, 1900; \$500 July 26, 1901, evidenced by notes of date of contract; Cook having the privilege to pay at any time the entire amount unpaid, when he should be entitled to a deed; Cook also to pay all taxes, assessments,

or impositions that might be legally levied subsequent to the year 1895; the contract further providing "that in case of the failure of the party of the second part (Cook) to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into at the time and in the manner herein provided, this contract shall become and is hereby made a lease of the above described tract from first party hereto to second party, and the payments herein specified for shall be and are hereby made a rental for said premises for the several terms between the times of said payments, and upon such failure, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained and he shall have the right to reënter and take possession of the premises aforesaid, provided that before reëntering and taking possession thereof he shall tender or return to the second party all his unpaid notes that are not due at such time"; it was also agreed that the time of payment should be of the essence of the contract and that all covenants and agreements should extend to the heirs, executors, administrators and assigns of the parties; on July 19, 1896, Cook assigned in writing a one-half interest in the contract to G. W. Spaulding who agreed to pay one-half the notes then unpaid; on July 29, 1896, Cook assigned in writing the other one-half interest in the contract to Ira B. Spaulding who agreed to pay one-half the notes then unpaid; on March 24, 1896, the Spauldings assigned in writing to appellant all their interest in the contract and in pursuance of such assignment appellant took and still retains possession of the land. Judgment is prayed for \$800. Overruling a demurrer to this complaint, is the only error assigned.

The contract between appellee and Cook is novel but it is

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susceptible of a reasonable and fair construction. Appellant, as assignee of Cook's assignees, did not assume to pay the notes named in the agreement. If the instrument is construed to be a bond for a deed, appellant, as such assignee, is not liable to a personal judgment on the notes. Appellant did not agree to assume and pay the notes. The same rule should govern as that applied to a purchaser of land encumbered by a mortgage. *Hancock v. Fleming*, 103 Ind. 533; *Adams v. Wheeler*, 122 Ind. 251; *Ayres v. Randall*, 108 Ind. 595. Had Cook continued a party to the agreement and paid the several notes as they became due, at the expiration of the time he could have demanded a deed, and the same is true of his assignees. But it was expressly agreed that if Cook failed to make any payment or any part thereof or perform any covenant in the agreement at the time and in the manner provided, the "contract shall become and is hereby made a lease" of the land from appellee to Cook and the "payments herein provided for shall be and are hereby made a rental for said premises for the several terms between the times of said payments."

Appellant went into possession under a contract which, if fully performed by it, would result in its ownership of the land. But if it failed to perform the agreement the stipulated payments were to become rent. It is quite true that if a person goes into possession of real estate under a contract to purchase, he does not thereby become the vendor's tenant so as to become liable for rent in case the contract is rescinded. *Hopkins v. Ratliff*, 115 Ind. 213. But we know of nothing to prevent the parties from agreeing that, although the contract is originally one of purchase, it may become, under certain conditions therein named, a lease. It is a matter about which the parties might rightfully contract and the contract when made may be enforced.

Appellant, as assignee of the contract, went into possession whereby it might ultimately become the owner of the

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land. It could become such owner only by compliance with the contract, and making the payments therein provided. But it made default in the payment due July, 1898. The contract provided for this default, and from its express terms, appellant having taken possession, the conclusion necessarily follows that the relation of landlord and tenant then existed. It is true it went into possession as a purchaser and continued in such possession until default, but it certainly will not be heard to say that, by the terms of the contract, it is not liable for the use and occupation of the premises for the year immediately preceding the default. The contract means and in fact says that upon this default the contract should be construed to be a lease at a certain named yearly rental stipulated in the contract. The contract itself extends its covenants to assignees, and although appellant is not liable on the note, it is liable upon the covenants in the contract and this liability arises from the privity of estate through its interest in the contract and its right to enjoy its benefits. See, *Edmonds v. Mounsey*, 15 Ind. App. 399; *Breckenridge v. Parrott*, 15 Ind. App. 411; *Carley v. Lewis*, 24 Ind. 23.

The contract and its assignments are made part of the complaint, but the suit is not to recover the sum named in the contract as rent. The theory of the complaint is an action on the note, but as appellant is not liable on the note the demurrer to the complaint should have been sustained.

Judgment reversed.

State v. Cosner.

**THIRD NATIONAL BANK OF GREENSBURG v. CAPP,
ADMINISTRATOR, ETC.**

[No. 3,228. Filed Feb. 15, 1900. Rehearing denied June 20, 1900.]

From the Shelby Circuit Court. *Affirmed.*

B. F. Bennett, T. E. Davidson, D. A. Myers, T. E. Adams and Isaac Carter, for appellant.

B. L. Smith, C. Cambern and D. L. Smith, for appellee.

COMSTOCK, J.—The questions involved in this appeal are the same in principle as those decided in *Tarplee v. Capp, Adm., ante*, 56. Upon the authority of that decision the judgment of the trial court is affirmed.

MEEK, ADMINISTRATOR, v. CAPP, ADMINISTRATOR.

[No. 3,229. Filed June 21, 1900.]

From the Shelby Circuit Court. *Affirmed.*

B. F. Bennett, T. E. Davidson, D. A. Myers, T. B. Adams and Isaac Carter, for appellant.

D. L. Smith, C. Cambern, B. L. Smith, K. M. Hord and E. K. Adams, for appellee.

PER GURIAM.—The questions involved in this case are not materially different from those in the case of *Tarplee v. Capp, Adm., ante*, 56, and upon the authority of that decision the judgment is affirmed.

THE STATE v. COSNER ET AL.

[No. 3,182. Filed October 9, 1900.]

From the Lawrence Circuit Court. *Affirmed.*

J. A. Zaring, S. B. Lowe, McHenry Owen and W. L. Taylor, Attorney-General, for State.

C. C. Matson, J. Giles, J. C. Lawler, M. B. Hottel and W. H. Edwards, for appellees.

COMSTOCK, J.—Indictment for extortion in one count, based upon §2105 Burns 1894, §2018 Horner 1897. From the action of the trial court in quashing the indictment, the State appeals. In the case of *State v. Robinson*, 28 Ind. App. 424, this court held that the acts charged in the indictment before us did not constitute an offense under the section named. To that decision we adhere. Judgment affirmed.

Walmer v. Baxter.

STROTHER v. THE STATE.

[No. 3,512. Filed November 13, 1900.]

From the Monroe Circuit Court. *Affirmed.*

J. R. East, R. H. East and J. E. Kelley, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

WILEY, J.—The record before us presents the identical questions as were presented by the record in the case of *Roberts v. State*, ante, 366. The evidence in this case is a carbon copy of the evidence in the Roberts case. The decision in that case is controlling here, and upon that decision the judgment is affirmed.

HUNCHEON, ADMINISTRATOR, v. LONG.

[No. 3,320. Filed November 23, 1900.]

From the La Porte Circuit Court. *Reversed.*

N. F. Wolfe, E. E. Weir, M. H. Weir and Lemuel Darrow, for appellant.

F. E. Osborn and H. W. Sallwasser, for appellee.

COMSTOCK, J.—The only question presented by this appeal is decided by this court in *Huncheon v. Long*, ante, 530. Upon the authority of that decision the judgment of the trial court is reversed, with instructions to overrule the demurrer to appellant's complaint.

WALMER v. BAXTER ET AL.

[No. 3,066. Filed November 27, 1900.]

From the Blackford Circuit Court. *Reversed.*

J. A. Hindman for appellant.

J. S. Dailey, Abram Simmons, F. C. Dailey and C. W. Kinnan, for appellees.

BLACK, J.—This was a suit to enforce assessments for the construction of the Green street sewer in the city of Montpelier, the complaint consisting of six paragraphs. The questions presented are like those decided by us this day in the case of *Burris v. Baxter*, ante, 536, and upon the authority of that case and of *Spaulding v. Baxter*, ante, 485, the judgment is reversed, and the cause is remanded with instruction to sustain to the complaint the demurrer of appellee Baxter to the answer.

Evansville, etc., R. Co. v. Huffman.

EVANSVILLE AND INDIANAPOLIS RAILROAD COMPANY v.
HUFFMAN.

[No. 8,405. Filed December 13, 1900.]

From the Clay Circuit Court. *Reversed.*

J. G. Williams, D. P. Williams and G. A. Knight, for appellant.

Albert Payne and G. S. Payne, for appellee.

PER CURIAM.—Upon the appellee's confession of error, filed in this cause, the judgment is reversed, and the cause is remanded with instruction to sustain the appellant's demurrer to the complaint.

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ABATEMENT—When plea in abatement may be filed after cause is at issue, see **PLEADING**, 18; *Kokomo St. R. Co. v. Pittsburgh, etc., R. Co.*, 335.

Refusal of Receiver to Continue Action Against Corporation.—The refusal of a receiver of a corporation to continue an action previously brought by such corporation may be pleaded in abatement. *Ib.*

ACTION—For death by wrongful act, see **MINES AND MINERALS**; *Boyd v. Brazil Block Coal Co.*, 157.

An action at law cannot be maintained against a county treasurer for money owing by the county, see **COUNTIES**; *Heritage, Treas., v. Bronnenberg*, 692.

1. *Statutory Right.*—When a new right or proceeding is created by statute, and a mode prescribed for enforcing it, that mode must be pursued to the exclusion of all others.

Boyd v. Brazil Block Coal Co., 157.

2. *Limitation.—Death by Wrongful Act.—Statutes In Pari Materia.*—All statutes of the State on the subject of death by wrongful act are *in pari materia*, and must be construed together, and when so construed the provision of §285 Burns 1894 limiting the time within which an action may be brought for death by wrongful act to two years applies to §7473 Burns 1894, known as the coal mining act.

Elliott v. Brazil Block Coal Co., 592.

3. *Demand.—Suit on Contract for Wages.*—In an action for wages due under a contract it is not necessary that the complaint allege a previous demand, since the suit constitutes a sufficient demand.

Hartford Life Ins. Co. v. Bryan, 406.

ADVERSE POSSESSION—

Passageway Under Railroad.—Pleading.—A complaint by a landowner against a railroad company for damages on account of the action of defendant in closing up a passageway under its tracks, to plaintiff's damage, is sufficient against a demurrer, where it is alleged that plaintiff was the owner of the land with uninterrupted adverse use, under claim of right, with notice to defendant of the passageway for more than twenty-one years.

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AFFIDAVITS—For disturbing public meeting, see **CRIMINAL LAW**, 8; *State v. Bogard*, 123.

For motion for new trial, see **NEW TRIAL**, 2; *Campbell v. Nixon*, 90.

ALTERATION OF INSTRUMENTS—

Bonds.—Contracts.—Principal and Surety.—Release of Surety.—In an action on a bond given to secure the performance of a contract entered into by an agent for the sale of goods, it was shown that

ALTERATION OF INSTRUMENTS—Continued.

the contract authorized the agent to sell goods "in the State of Indiana and," with a blank of two and a half lines in the printed form of contract after the word "and," but the contract was otherwise complete upon its face; that after the execution of the bond by defendants, on the back of the contract, and without their knowledge or consent, plaintiff filled in the blank space, giving the agent additional territory in the state of Illinois. *Held*, that the alteration was material and unauthorized, and released the sureties on the bond. *Good Roads, etc., Co. v. Moore*, 479.

ANIMALS—Indictment under act of 1897 for keeping or harboring dog without holding tax receipt, see **CRIMINAL LAW**, 1; *State v. Thompson*, 581.

ANSWER—See **PLEADING**.

APPEAL AND ERROR—When trial judge not compelled to sign bill of exceptions, see **MANDAMUS**; *Bogue v. Murphy*, 102.

When judgment of acquittal will not be reviewed on appeal, see **CRIMINAL LAW**, 7; *State v. Phillips*, 579.

The rule that a cause will not be reversed on the weight of the evidence applies to affidavits and counter-affidavits as well as to oral evidence, see **EVIDENCE**, 11; *Masten v. Indiana Car, etc., Co.*, 175.

1. *Assignment of Errors*.—The correctness of facts found by the trial court is admitted by an assignment of error "that the court erred in its conclusions of law."
Indianapolis Nat. Gas Co. v. Pierce, 116.
2. *Assignment of Errors*.—An assignment of errors, that "the court erred in its special findings thirteen, fifteen, and sixteen, and also in overruling appellant's motion to strike out said findings," does not present any question on appeal. *Peterson v. Struby*, 19.
3. *Assignment of Cross-Errors*.—The action of the court in overruling a demurrer to the complaint cannot be reviewed on an appeal by plaintiff from the ruling on the answers where no assignment of cross-error was made thereon by appellee. *Farmers' Bank v. Orr*, 71.
4. *Joint Assignment of Error*.—*New Trial*.—*Instructions*.—A joint assignment, in a motion for a new trial, that the court erred in the giving or the refusal to give a series of instructions will not be considered on appeal, when appellant's attorney has failed to present in his brief an argument against the ruling of the trial court as to each instruction in the series.
City of Ft. Wayne v. Patterson, Adm., 547.
5. *Assignment of Errors*.—*New Trial*.—Errors in the giving and in the refusal to give instructions, and in the admission and rejection of evidence cannot be presented for review on appeal by independent assignments of error. Such questions must be assigned as causes in a motion for a new trial. *Jean v. State, ex rel.*, 339.
6. *Joint Assignment of Error*.—*Review*.—A ruling which does not affect all who jointly assign it as error will not be considered on appeal. *Advance Mfg. Co. v. Auch*, 687; *Osborn v. State, ex rel.*, 521.
7. *Joint Assignment of Error*.—A joint assignment of error as to the sufficiency of a complaint is not available if either paragraph thereof is good. *American Tin-Plate Co. v. Guy*, 588.

APPEAL AND ERROR—Continued.

8. *Joint Assignment of Errors.*—Where three parties have joined in an appeal by the assignment of joint errors, and have filed a joint brief, it is too late for two of them to say that they decline to join in the appeal of their co-appellant. *Advance Mfg. Co. v. Auch*, 687.
9. *Pleading.*—Available error cannot be predicated upon the action of the court in overruling a motion to require plaintiff to separate into paragraphs the causes of action improperly joined. *Everitt, Seedsman, v. Bassler*, 303.
10. *Parties.—Notice.*—The word co-parties, as used in §647 Burns 1894 providing that a part of several co-parties may appeal and must serve notice of the appeal upon all the other co-parties, means parties to the judgment appealed from, and not co-plaintiffs or codefendants. *Hildebrand, Tr., v. Sattley Mfg. Co.*, 218.
11. *Bill of Exceptions.—Mandamus.*—The determination as to what facts should be stated in a bill of exceptions invokes the exercise of a legal discretion, and is, therefore, a judicial act, and hence a superior tribunal cannot compel an inferior tribunal to say what shall go into a bill of exceptions. *Bogue v. Murphy*, 102.
12. *Bill of Exceptions.—Evidence.—Review.*—Where a bill of exceptions shows upon its face that it does not contain all the evidence, the Appellate Court will not consider any question which depends for its proper decision upon the evidence, although the bill states that it contains all the evidence. *Jean v. State ex rel.*, 339.
13. *Bill of Exceptions.—When Not in Record.*—A bill of exceptions does not become a part of the record unless it is presented to the trial judge within the time given. *City of Huntington v. Boyd*, 250.
14. *Record.—Bill of Exceptions.*—The record must affirmatively show that a bill of exceptions was filed in the clerk's office; the stencil file mark of the clerk indorsed thereon is not sufficient. *Peterson v. Struby*, 19.
15. *Exceptions.*—The action of the court in overruling a motion for a new trial will not be considered on appeal, where it is not shown that any exception was taken to the ruling on the motion at the time it was made, but that an exception was taken on the following day and a motion for a *nunc pro tunc* entry made and overruled, and no error assigned on such ruling. *Tecumseh Facing Mills v. Sweet, Dempster & Co.*, 284.
16. *Joint Exceptions.*—Where an exception is made jointly to the conclusions of law, and any one of the conclusions is right the exception must fail. *Hildebrand Tr. v. Sattley Mfg. Co.*, 218.
17. *Record.—Precipe.*—Where the record purports to contain such parts of the proceedings as were ordered by the precipe, only such entries and papers as are embraced in the precipe are properly parts of the record, and, in the absence of the precipe, the record in such case cannot be considered. *Hollis v. Roberts*, 426.
18. *Record.*—Where the record fails to show that the trial court made any ruling upon a demurrer to a pleading, no question is presented. *Ib.*
19. *Record.—Marginal Notes.—Evidence.*—Questions depending upon the evidence will not be considered on appeal, where the evidence covers over 500 pages of typewritten matter, and the record contains no marginal notes, as required by rule thirty of the Appellate Court. *Citizens' Street R. Co., v. Damm*, 511.

APPEAL AND ERROR—Continued.

20. *References to Record.—Waiver.*—Where a party fails to call the court's attention to the particular part of the record where the questions asked to be decided may be found he thereby waives his right to have them decided. *Home Ins. Co. v. Sylvester, 207.*
21. *Motions.—How Made Part of Record.*—To make motions to retax costs or to modify the judgment parts of the record by order of court, instead of by bill of exceptions, they must be set out in the order. *Binford v. Dukes, 670.*
22. *Record.—Motion to Strike Out Parts of Pleading.*—In order to present any question for review upon appeal on the ruling of the court upon a motion to strike out a pleading or a part thereof, such pleadings or parts of pleading, the motion, and ruling thereon, must be brought into the record by a bill of exceptions. *Brown v. Langner, 538; Supreme Tent, etc., v. Volkert, 627.*
23. *Motions.*—A judgment will not be reversed because of the action of the court in overruling a motion to strike out parts of a complaint. *Brown v. Langner, 538.*
24. *When Evidence Not in Record.*—Under the act of March 3, 1899 (Acts 1899, p. 884), the evidence is not properly in the record, where it is not shown that any time was fixed by the court in which the transcript of the evidence was to be filed with the clerk, the clerk does not certify that the certificate of the judge attached is that of the judge, and the certificate of the clerk does not show when the long-hand manuscript of the evidence was filed in his office. *Sprankle v. Bart, 681.*
25. *Record.—Instructions.*—Instructions in a criminal cause can only be brought into the record by bill of exceptions. *Neeld v. State, 603.*
26. *Waiver.—Default.*—Where a proceeding to set aside a default was disposed of on its merits without objection to the form of the proceeding, no such question can be raised on appeal. *Masten v. Indiana Car, etc., Co., 175.*
27. *Default.—Pleading.*—Where an application to set aside a default is not treated as a pleading in the trial court it cannot be thus questioned on appeal. *Ib.*
28. *Judgment.—Default.*—The action of the court in setting aside a judgment rendered by default upon application and affidavits tending to show that the default resulted from excusable neglect and inadvertence will not be disturbed on appeal unless an abuse of discretion on the part of the trial court is shown. *Ib.*
29. *Instructions.—Presumption.*—It will be presumed on appeal that instructions tendered and refused were refused because they were not tendered in time, where the record does not affirmatively show that they were tendered before the argument was commenced. *Sprankle v. Bart, 681.*
30. *Jury.*—A judgment in an action on an account will not be reversed because the jury took to their room the complaint, with which was filed a verified bill of particulars, at the end of which was a memorandum of interest due on the account, where the proper amount of interest was included in the verdict. *Haas v. Cones Mfg. Co., 469.*
31. *Evidence.*—The ruling of the court in excluding testimony will not be reversed on appeal if the ruling can be sustained upon any theory, whether advanced at the time of the ruling or not. *Ib.*

APPEAL AND ERROR—Continued.

32. *Evidence.—Objections.*—Only the grounds of objection presented to the trial court can be considered on appeal as against the ruling of the court. *Everitt, Seedsman, v. Indiana Paper Co., 287.*
33. *Damages.—Evidence.*—A judgment for damages arising from the breach of an oil and gas lease will not be reversed on appeal because of insufficiency of damages awarded, where the evidence as to damages is conflicting. *Trammel v. Briant, 375.*
34. *Excessive Damages.*—An assignment in a motion for a new trial in an action for damages for a breach of contract that the damages assessed were excessive presents no question, since the question of excessive damages can arise only in actions *ex delicto*. *Bluffton, etc., Ice Co. v. Richardson, 263.*
35. *Sustaining Demurrer to Argumentative Denial.—When Harmless Error.*—It is not reversible error to sustain a demurrer to a paragraph of answer which is merely an argumentative denial, a general denial having been pleaded. *City of Huntington v. Boyd, 250; Burket v. Miller, 110.*
36. *Harmless Error.*—The rule that error in overruling a demurrer to a complaint is cured by special finding of facts and conclusions of law thereon, is based upon the premise that a right result was reached. *Vestal v. Craig, 573.*
37. *New Trial.*—Neither the ground that “a finding and judgment” on a counterclaim is contrary to law, nor that it is contrary to the evidence, is a cause for a new trial recognized by statute. *Binford v. Dukes, 670.*
38. *Inconsistent Special Findings.—New Trial.*—That certain special findings are inconsistent with other findings is not a reason for a new trial. *Peterson v. Struby, 19.*

APPEARANCE—

Judgment.—Where in an action against a foreign corporation on account and in attachment defendant appeared to the main action and filed answer, such appearance gave the court power to render a personal judgment. *Hartford Life Ins. Co. v. Bryan, 406.*

ASSIGNMENT FOR BENEFIT OF CREDITORS—

Mortgages.—Instructions not Applicable to Evidence.—An insolvent debtor executed a mortgage on real estate to defendant to secure plaintiff and other creditors whom he wished to prefer, defendant giving due bills to each of the creditors so secured as a memorandum of claim. The next day the debtor made a general assignment for the benefit of creditors, and the assignee, pursuant to an order of court, sold and conveyed the land to defendant. Defendant paid off prior liens, and settled with all of the other creditors, except plaintiff, who refused to accept less than the full amount of his claim and brought suit on the due bill given him by defendant. *Held*, that the court erred in instructing the jury that if they believed that defendant accepted a deed to the land assuming the encumbrances thereon he would be liable for the full amount of plaintiff's debt, where the deed is not in evidence, and there is no evidence that it contained any stipulation for the assumption of the encumbrances by the grantee. *Shilling v. Braniff, 676.*

ATTACHMENT—A receiver appointed for a foreign corporation in another state does not thereby acquire such title to the property of the corporation situate in this State as to defeat an attachment subsequently issued at the instance of a creditor by a court in this State. See RECEIVERS, 2; *Gray, Rec., v. Covert*, 561.

Quashing Writ.—Complaint.—Attachment proceedings are merely ancillary to the main action, and the quashing of the writ of attachment does not carry with it the complaint.

Hartford Life Ins. Co. v. Bryan, 406.

ATTORNEY AND CLIENT—

1. *May Bind Client for Services of Stenographer.*—An attorney having general control of the trial of a cause may bind his client to pay for copies of the evidence furnished by a stenographer for use in the trial of such cause. *Miller v. Palmer*, 567.

2. *Lien for Fees.—Judgments.*—Attorneys at law successfully prosecuted an action for their client, and filed a lien on the judgment for their stipulated fee, and, thereafter, the client, without the knowledge or consent of the attorneys, assigned the judgment to a third party without consideration; later, the assignee of the judgment, without the knowledge or consent of the attorneys, and without consideration, satisfied the judgment of record. Held, that the lien was in no way affected by the transaction, and that the assignee did not become personally liable to the attorneys.

Peterson v. Struby, 19.

ATTORNEY-GENERAL—There is no constitutional or statutory inhibition against the Attorney-General practicing law.

Masten v. Indiana Car, etc., Co., 175.

BAILMENT—See WAREHOUSEMEN.

BANKS AND BANKING—As to taxation of the real estate of National banks, see TAXATION, 1; *Board, etc., v. First Nat. Bank*, 94.

BASTARDS—

Amount of Judgment.—Discretion of Court.—The amount of judgment in a bastardy proceeding is largely in the discretion of the court and will not be disturbed on appeal unless it is shown that the judge has abused his discretion. *Jean v. State, ex rel.*, 339.

BENEFICIAL ASSOCIATIONS—See INSURANCE.

1. *Rights of Member to Benefits.*—A member of a beneficial association who, during the time for which he claimed indemnity, was, on account of sickness, wholly disabled and prevented from prosecuting any and all kinds of business, does not forfeit his right to indemnity by leaving his room, under the direction of a physician, for the benefit of his health, although such act was in violation of the strict letter of the contract. *Columbian, etc., Assn. v. Gross*, 215.

2. *Forfeitures.—Prohibited Occupations. — Estoppel.*—Where the local officers of a fraternal insurance company received the dues and assessments of a member after he had engaged in the liquor traffic, with a knowledge of such fact, and the company received and retained the last payment with a knowledge thereof, and of the further fact that he died while so engaged, the company will

BENEFICIAL ASSOCIATIONS—Continued.

be estopped from asserting a forfeiture of the certificate under a by-law prohibiting members from engaging in the sale of intoxicating liquors. *Supreme Tent, etc., v. Volkert, 627.*

3. *Forfeitures.—Prohibited Occupations.—Estoppel.*—Where a fraternal insurance company sent blank forms for proof of death and required them to be filled out and sworn to by beneficiary, with knowledge that insured had engaged in the sale of intoxicating liquors in violation of the by-laws of such company, the company is estopped from setting up a forfeiture of the certificate on the ground that he engaged in such prohibited occupation. *Ib.*
4. *Certificate.—By-Laws.—Conflict.*—Where the certificate issued by a fraternal insurance company provides that the board of trustees may suspend members from all benefits of the order who after admission engage in occupations prohibited by the by-laws, and the by-laws provide that members who engage in such prohibited occupations shall stand suspended, the court, in determining the rights of the parties, will adopt the provision that will give the greater right to the insured and his beneficiary. *Ib.*
5. *Collection of Assessments.—Local Officers Agents of Company.*—Where payment of dues and assessments to the local officers is the only method provided by a fraternal insurance company, and it is made the duty of such officers to transmit same to the home office of the company, the local officers in the collection and transmission of dues and assessments are the agents of the company, notwithstanding a provision in the by-laws to the contrary. *Ib.*

BILLS AND NOTES—Discharge of surety on account of extension of time of payment, see **PRINCIPAL AND SURETY**, 1; *Bowman, Adm., v. Citizens' Nat. Bank, 38.*

Equitable defense in action by indorsee of note, see **TRIAL**, 13; *Cooper v. Merchants', etc., Bank, 342.*

Warehouse receipt not a negotiable instrument, see **WAREHOUSEMEN**, 1; *Toner v. Citizens' State Bank, 29.*

1. *Party in Interest.—Burden of Proof.*—The holder of a note is *prima facie* the owner thereof, and entitled to sue upon it, and the burden of showing that he is not the real party in interest, as well as of showing payment, is upon the defendant in the event of a suit by the holder. *Ayres, Rec., v. Foster, 99.*
2. *Negotiable Instruments.—Instalments of Interest Due and Unpaid.*—A note, negotiable under the law merchant, does not lose its negotiability by instalments of interest thereon remaining due and unpaid. *Cooper v. Merchants', etc., Bank, 341.*
3. *Signatures.—Agreement.—Delivery.*—Evidence in an action on a promissory note that the note was delivered to the agent of the payee under an agreement that the note should not be delivered until signed by another person, is inadmissible, since delivery to the agent passed the title to the payee. *Ib.*
4. *Evidence.—Good Faith of Purchaser.*—Although a note does not lose its negotiability by instalments of interest thereon remaining due and unpaid, evidence that the purchaser of a note bought it with knowledge that two annual instalments of interest were due thereon, was admissible on the question of the good faith of the purchaser. *Ib.*

BILLS AND NOTES—Continued.

5. *Indorsement After Maturity.*—If negotiable promissory notes given for rent are surrendered for the use of the lessee, or for cancelation, the subsequent indorsement of such notes by the lessor after maturity confers no right of action upon the indorsee.

Campbell v. Nixon, 90.

6. *Action Against Indorsers.—Special Finding.*—In an action on a negotiable promissory note, a judgment against indorsers cannot be sustained on special findings which show no demand on the maker for payment, and no notice to the indorsers of non-payment, and no waiver of such demand and notice.

LaFollette Coal, etc., Co. v. Whiting Foundry, etc., Co., 647.

BONDS—Action on injunction bond, see **INJUNCTION**; *Burket v. Miller, 110.*

Action on garnishment bond, see **GARNISHMENT**; *Davis v. Bickel, 378.*

Release of surety by adding words in blank space in bond, see

ALTERATION OF INSTRUMENTS; *Good Roads, etc., Co. v. Moore, 479.*

1. *Guaranty. — Liquidated Damages. — Action. — Parties.*—Where defendants, by a separate instrument, guaranteed the performance of a contract entered into by a gas company to supply plaintiff with gas, binding themselves to pay plaintiff a certain sum as liquidated damages upon a breach of the contract on the part of the company, it is not necessary, in a suit on the bond, to allege the insolvency of the company. *Shelby, Adm., v. Bohn, 473.*

2. *Action.—Answer.*—An answer in an action on a bond given to secure the performance of a contract entered into by a gas company that after the breach of the bond the company was placed in the hands of a receiver, who sold all its property and paid the claims of the company in full and had ample funds in his hands to pay plaintiff's claim, but plaintiff refused to present or file his claim with the receiver, is insufficient, since plaintiff's right of action was complete upon the breach of the contract, and it is not shown that the company was solvent at such time. *Ib.*

3. *Action. — Decedents' Estates.*—An answer in an action on a bond that two of the makers died after the breach thereof, as alleged in the complaint, and that their estates, which were solvent, had been fully administered upon and finally settled, and that plaintiff neglected and failed to file any claims against said estates, asking that the proper share of each of said estates be deducted from any amount found to be due because of the breach of the bond, was insufficient, where it was not shown that such estates were administered upon in this State. *Ib.*

4. *Action. — Pleading.*—A contract with a city for certain sidewalk improvements provided that the work should be completed at a specified time. The bond given to secure the performance of the contract stipulated that any extension by the city of the time for the completion of the work should in no way release the sureties on the bond. The work was not completed within the time specified, but upon its completion it was approved and accepted by the city. *Held*, in an action on the bond by a material man for the value of materials furnished the contractor at a time subsequent to the time named for the completion of the work, that it was not necessary for the complaint to aver an extension of time by the city, and that there need be no finding of such extension other than that the work had been completed under the contract and accepted.

Mankedick v. Consolidated Coal, etc., Co., 135.

BREACH OF MARRIAGE PROMISE—

1. *Evidence.*—The testimony of plaintiff in an action for a breach of marriage promise that defendant asked her to marry him, that she consented, that he asked her to go to his home and get it ready for the marriage, and that the day for the marriage was fixed, was sufficient to justify the jury, if they believed the testimony to be true, in finding that there was an unconditional promise and agreement to marry. *Lauer v. Schmidt*, 54.
2. *Excessive Damages.*—A judgment for breach of marriage promise will not be reversed as excessive unless the amount assessed clearly appears to have been the result of prejudice, partiality, or corruption. *Ib.*

CARRIERS—Delivery of goods to wrong person, see **CONVERSION** 1; *Cleveland, etc., R. Co. v. Wright*, 525.

1. *Injury of Passenger.—Negligence.*—Where a passenger is injured by the derailment of a train he is only required to show that he was injured without fault on his part, the law then presumes negligence upon the part of the carrier, and it devolves upon the carrier to remove such presumption. *Chicago, etc., R. Co. v. Grimm*, 494.
2. *Personal Injury of Passenger.—Negligence.—Instructions.*—An instruction in the trial of an action against a railroad company for personal injuries to a passenger that when a carrier receives a passenger on its train it undertakes to carry him safely to his destination was not misleading when considered with another instruction that the greatest possible care to be exercised by a railroad company for the safety of its passengers is not to be understood as requiring the utmost degree of care which the mind can attain to or is capable of inventing, but simply means the greatest degree of care that is consistent with the particular mode of transportation. *Ib.*
3. *Railroads.—Injury to Passenger.—Instruction.*—In an action by a passenger against a railroad company for personal injuries, it is proper to instruct the jury that plaintiff had a right to rely on the company's discharging its duty toward her in providing suitable station platforms, and such assistance from trainmen as might be necessary to enable her to alight in safety, the stopping of trains at stations at the proper place, and for a sufficient length of time to enable passengers to alight safely; and if the company is negligent in the discharge of one or all of such duties and plaintiff was injured thereby without any fault on her part, the company is liable for the injuries sustained. *Lake Erie, etc., R. Co. v. Taylor*, 679.

CITIES—See **MUNICIPAL CORPORATIONS**.

COMMON LAW—Enforcement of common law lien of mechanic or tradesman, see **LIENS**; *Bierly v. Royse*, 202.

COMPLAINT—See **PLEADING**.

In action on claim against a decedent's estate, see **DECEDENTS' ESTATES**; *Bowman, Adm., v. Citizens' Nat. Bank*, 38.

In action on contractor's bond, see **BONDS**, 4; *Mankedick v. Consolidated Coal, etc., Co.*, 135.

CONSTABLE—

1. *Compensation.—Expenses in Caring for Property Seized.*—A constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in caring for and preserving property seized under a valid process. *State ex rel. v. Hitchens*, 244.

CONSTABLE—Continued.

2. *Failure to Itemize Costs.*—The failure of a constable to itemize in his return of writ the services for which he charged will not, in an action by a judgment creditor to compel such officer to turn over money unlawfully retained as costs, defeat the constable's right to statutory fees to which it clearly appears from the evidence he is entitled. *Ib.*
3. *Compensation.—Expenses of Sale.*—The duty of selling goods levied on by a constable devolves upon that officer, for which services he receives as compensation the statutory commission. He is not authorized to tax and collect, as part of his costs, the sums paid to an auctioneer and clerk employed by him to assist in the sale. *Ib.*

CONTRACTS—See BREACH OF MARRIAGE PROMISE; SALES; VENDOR AND PURCHASER.

Of sale where title remained in seller, see **SALES**, 1; *Turk v. Carnahan*, 125.

By correspondence, see **EVIDENCE**, 9; *Everitt, Seedsman, v. Bassler*, 303.

Breach of contract for work and labor, see **WORK AND LABOR**, 1; *Brown v. Langner*, 538.

To sell or transfer sheriff's certificate of sale of real estate must be in writing, see **FRAUDS, STATUTE OF**; *Cox v. Roberts*, 252.

It was error to permit witness to explain contract where contract was not ambiguous or uncertain in its terms, see **EVIDENCE**, 8; *Brown v. Langner*, 538.

In an action on a contract to furnish certain quantity of paper, evidence that a specification therein had a particular meaning to the paper trade was admissible, see **EVIDENCE**, 4; *Everitt, Seedsman, v. Indiana Paper Co.*, 287.

1. *Construction.*—A contract is only to be construed most strongly against the moving party when it will equally admit of two or more interpretations. *Beck, etc., Co. v. Evansville Brewing Co.*, 662.
2. *Construction.*—A contract "for five M., each, letter-heads, 8½ x 11, business cards, envelopes, statements, at \$12 per M., and hangers * * * at 22c. each," is construed as a matter of law to be a contract for the purchase of 5,000 hangers at 22c. each, as well as for 5,000 each of letter-heads, cards, envelopes and statements at \$12 per thousand. *Ib.*
3. *Work and Labor.—Bill of Extras.—Instructions.*—Where a contract sued upon by a subcontractor for extra work in plastering a school building embraced the original contract and plans and specifications, which provided that any changes or modifications in the contract or specifications could only be made in writing, by the parties to the original contract, an instruction to the effect that plaintiff could not recover for extra work or material, except for crooked walls, unless it was shown that a change, in writing, was made in the plans and specifications requiring extra work or extra material, was improperly refused. *Brown v. Langner*, 538.
4. *Construction.—Instructions.*—In an action by a subcontractor to recover for extra work and material in the construction of a build-

CONTRACTS—Continued.

- ing, the question as to what plaintiff was required to do under the contract was a matter for the determination of the court, and not for the jury. *Ib.*
5. *Breach.—Contracts by Correspondence.—Complaint.*—In an action for breach of contract of employment made by correspondence in which it was alleged that on a certain date plaintiff made his proposal by letter, stating the terms under which he would enter into the employment of defendant, and defendant, by letter, unconditionally accepted plaintiff's terms, the minds of the contracting parties met, and the contract was complete, and it was not necessary to make any previous correspondence a part of the complaint. *Everitt, Seedsman, v. Bassler, 303.*
6. *Construction.—Evidence.*—Plaintiff entered into a contract to furnish defendant a certain quantity of paper to match the paper of an old catalogue for quality, finish and appearance, the "weight to be on the basis of 37x48, 53 lbs., 500 sheets." There was evidence that the paper met the requirement as to quality, finish, and appearance, but there was a conflict as to whether the paper furnished reached the weight required by the contract. There was no evidence that any of it fell below fifty pounds, and there was evidence that it is impossible to make all sheets alike in weight, and that fifty pound paper would print just as good a job as fifty-three pound paper, and unless the paper was put on the scales the difference would not be known. *Held*, that the evidence showed a substantial compliance with the contract. *Everitt, Seedsman, v. Indiana Paper Co., 287.*
7. *Mistake.—Notice.—Pleading.*—An action by a landowner against a railroad company for damages on account of the alleged closing of a passageway under defendant's tracks cannot be maintained, where the complaint was based upon a written contract or deed executed by plaintiff's remote grantor to defendant's remote grantor and it is disclosed by the deed that the part of the land upon which the underground passageway was located was omitted from the deed, since the deed was not notice to defendant of its liability to maintain such crossing at any place other than upon the land described, and an allegation that the parties to the deed by mutual mistake omitted to describe the tract upon which the passageway was located has no force unless such mistake was brought to the notice of defendant. *Lake Erie, etc., R. Co. v. Hoff, 239.*

CONTRIBUTORY NEGLIGENCE—See MASTER AND SERVANT; NEGLIGENCE

Of employe who sues employer for damages for personal injuries, see MASTER AND SERVANT, 3, 4, 9; *LaFayette Carpet Co. v. Stafford, 187; Pittsburgh, etc., R. Co. v. Elwood, 671; City of Ft. Wayne v. Patterson, Adm., 548.*

Personal Injuries.—Master and Servant.—In an action by an employe for personal injuries sustained while working about a machine in defendant's factory, a finding by the jury that it was not necessary that plaintiff should come in contact with the cog-wheels which caused the injury, in the proper performance of his duties, and that he came in contact with said wheels through his own thoughtlessness and inattention, shows negligence of plaintiff contributing to his injury, and precludes a recovery.

Morewood Co. v. Smith, 264.

CONVERSION—

1. *Common Carrier.—Warehousemen.*—Where a railroad company voluntarily delivers goods to the wrong person, such company is liable for conversion, either as common carrier or warehouseman, without regard to the question of negligence.
Cleveland, etc., R. Co. v. Wright, 525.
2. *Pleading.—Evidence.*—In an action against a railroad company for the conversion of property delivered to it for transportation, the company may, under a general denial, show that the property was taken from its possession by writ of replevin issued in an action instituted by a third person. *Ib.*

CORPORATIONS—See MUNICIPAL CORPORATIONS.

Right of receiver of foreign corporation to property in this State attached by a creditor, see **RECEIVERS**, 2; *Gray, Rec., v. Covert, 561.*

1. *Enforcement of Stock Subscription.*—A subscriber to the capital stock of a proposed corporation can be compelled to pay such subscription only upon a showing that a *de jure* organization of the proposed corporation has been formed.
Williams v. Citizens', etc., Co., 351.
2. *Employment of Physician for Injured Employee.—Authority of Agent.*—The employment of a physician by the manager of a private corporation, to render medical and surgical treatment on behalf of an employee who had been injured while in the line of his duty, will not bind the corporation, in the absence of a showing that such employment was within the scope of the manager's authority.
New Pittsburgh Coal, etc., Co. v. Shaley, 282.
3. *Toll Roads.—Action for Toll.—Defense.—Want of Repair.*—Where a turnpike company was incorporated by special act of the General Assembly in the year 1848, the company in accepting the charter impliedly agreed to maintain the road in good repair, and the act of 1859 (§3684 Burns 1894) rendering tolls uncollectible where turnpike roads are permitted to remain out of repair, does not impose any additional burden, and its provisions are therefore binding on such company.
Aurora, etc., Turnpike Co. v. Niebruggee, 567.
4. *Organization.—Statute Construed.*—Where it is sought to incorporate under the manufacturing and mining statute, §5051 Burns 1894, and it is specified in the articles that the objects of the corporation are to furnish motive power to carry on manufacturing and mining business, to manufacture all kinds of merchandise, and to sink and operate oil and gas wells, to take stock in other corporations, loan and donate money, etc., the articles of incorporation are void.
Williams v. Citizens', etc., Co., 351.

COSTS—A constable is not authorized to tax and collect as part of his costs money paid auctioneer and clerk employed by him to assist in the sale. See **CONSTABLE**, 3; *State, ex rel., v. Hitchens, 244.*
Failure of constable to itemize costs will not defeat his right to statutory fees, see **CONSTABLE**, 2; *Ib.*

COUNTERCLAIM—See PLEADING.**COUNTIES—**

Action Against Treasurer for Money Owing by County.—An action at law cannot be maintained against a certain named person as county treasurer to recover a judgment for money owing by the county.
Heritage, Treas., v. Bronnenberg, 692.

COUNTY COMMISSIONERS—Indictment for payment of money to county auditor for work as clerk of board on account of gravel roads, see **CRIMINAL LAW**, 2; *State v. Trueblood*, 437.

COURTS—See **JUSTICES OF THE PEACE**.

When trial judge not compelled to sign bill of exceptions, see **MANDAMUS**; *Bogue v. Murphy*, 102.

Justices of the Peace.—*Jurisdiction.*—*Presumption.*—A justice of the peace court being of special limited jurisdiction no presumptions will be indulged as to its jurisdiction, but when it is made to appear that it has acquired jurisdiction the same presumptions are indulged in favor of its proceedings as of courts of general jurisdiction. *Davis v. Bickle*, 378.

COVENANTS—

Of Railroad Company to Maintain Fence.—A covenant of a railroad company to maintain a fence along right of way runs with the land. *Lake Erie, etc., R. Co. v. Griffin*, 138.

CRIMINAL LAW—See **GAMING**.

Affidavit and information charging one with visiting a gambling house, see **GAMING**, 1; *Roberts v. State*, 366.

1. *Failure to Pay Dog Tax.*—*Indictment.*—An indictment, under the act of 1897 (Acts 1897, p. 178), for keeping or harboring a dog without holding a township assessor's or township trustee's receipt showing the required tax has been paid for same as provided in said act, which follows the language of §9 thereof is sufficient. *State v. Thompson*, 581.
2. *Illegal Allowance by County Commissioners.*—*Indictment.*—Under §7853 Burns 1894, making it a public offense for the board of county commissioners, except in case of indispensable public necessity, to make any allowance to certain named county officers, an indictment for the payment of money to the county auditor for extra work as clerk of the board on account of gravel roads is held insufficient. *State v. Trueblood*, 437.
3. *Former Conviction.*—*Disturbing Public Meeting.*—An affidavit charging that on a certain day defendant "was found disturbing the peace in a certain public at Bethana Church in Greene county, State of Indiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana," does not state any criminal offense, and a conviction based thereon is no bar to a subsequent prosecution for disturbing a public meeting. *State v. Bogard*, 123.
4. *Evidence.*—*Trial.*—In a prosecution for selling liquor in violation of law the court erred in requiring defendant, who voluntarily became a witness in his own behalf, to answer questions on cross-examination which might expose him to criminal prosecution. *Baehner v. State*, 597.
5. *Appeal from Justice of the Peace.*—*Arraignment.*—Where a defendant has pleaded not guilty to a criminal charge before a justice of the peace, no other plea is required on appeal to the circuit or criminal court. *Cline v. State*, 331.
6. *Appeal from Justice of the Peace.*—*Arraignment.*—Where one charged with a misdemeanor before a justice of the peace was tried and convicted upon a plea of not guilty, and thereafter appealed to the circuit court, the entertainment of a motion in the latter court to quash the affidavit does not operate as a withdrawal of the plea. *Id.*

CRIMINAL LAW—Continued.

7. *Appeal by State.—Question of Fact.*—A judgment of acquittal will not be reviewed on appeal on an assignment of error that "the court erred in its rulings upon the point of law reserved by the State for the decision of this court, in that it found appellee not guilty upon the agreed statement of facts," since such assignment presents for review only a question of fact, and not one of law.
State v. Phillips, 579.

CUSTOMS AND USAGES—As an aid in the interpretation of contracts, see EVIDENCE, 4; *Everitt, Seedsman, v. Indiana Paper Co., 287.*

DAMAGES—See CARRIERS; MASTER AND SERVANT; NEGLIGENCE.

For breach of covenant by a railroad company to fence right of way, see RAILROADS, 6, 7, 8; *Lake Erie, etc., R. Co. v. Griffin, 138.*

Measure of in action against a cold storage company for damages to goods while stored, see WAREHOUSEMEN, 4; *Holt Ice, etc., Co. v. Arthur Jordan Co., 314.*

Measure in action for seduction, see SEDUCTION, 6; *Gemmell v. Brown, 6.*

For personal injuries to employe caused by violation of statutory duty by employer, see NEGLIGENCE, 8; *Bodell v. Brazil Block Coal Co., 654.*

To stock resulting from negligence in cleaning drain, see NEGLIGENCE, 1, 2; *Sprankle v. Bart, 681.*

Insufficiency of damages in action for breach of oil and gas lease, see APPEAL AND ERROR, 33; *Trammel v. Briant, 375.*

Excessive damages in action for breach of marriage promise, see BREACH OF MARRIAGE PROMISE, 2; *Lauer v. Schmidt, 54.*

The question of excessive damages can only arise in actions *ex delicto*, see APPEAL AND ERROR, 34; *Bluffton, etc., Ice Co. v. Richardson, 263.*

1. *Master and Servant.—Agreement to Furnish Medical Treatment.*—Where a corporation deducts a portion of its employe's wages for the purpose of employing a physician under an agreement to furnish and provide competent medical and surgical services to the employe and his family, the corporation is liable in damages to the employe for the death of his child caused by the negligent failure of the corporation to perform its part of the contract.

American Tin-Plate Co. v. Guy, 588.

2. *Nervous Prostration.—Fright.*—An action cannot be maintained for damages on account of nervous prostration resulting from fright caused by defendant entering upon the premises of plaintiff's husband and quarreling with him, within hearing of plaintiff, after being ordered away, knowing plaintiff was in delicate health and easily excited.

Gaskins v. Runkle, 584.

3. *Negligence.—Proximate Cause.—Railroads.*—Where defendant negligently ran its locomotive through the streets of a town at a dangerous and unusual rate of speed and struck a person and

DAMAGES—Continued.

hurled his body at and against plaintiff, who was standing on the platform of defendant's station, and injured him, such injury was not the natural and probable consequence of defendant's negligence, and plaintiff cannot recover damages therefor.

Evansville, etc., R. Co. v. Welch, 308.

4. *Excessive Damages.—Appeal.*—The verdict of a jury will not be set aside on appeal on the ground that the damages assessed are excessive, where the damages assessed are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, partiality or corruption.

City of Indianapolis v. Marold, 428.

DEATH—Action for death of coal mine employe. See MINES AND MINERALS; *Boyd v. Brazil Block Coal Co.*, 157.

Action for death of coal mine employe must be brought within two years. See ACTION, 2; *Elliott v. Brazil Block Coal Co.*, 592.

Limitation of time in which action can be brought under coal-mining statute by infant plaintiff for death by wrongful act, see LIMITATION OF ACTIONS; *Ib.*

Action against railroad company for death of plaintiff's son while bathing in swimming pool conducted by defendant, see NEGLIGENCE, 7; *Bass, Rec., v. Reitdorf*, 650.

DECEDENTS' ESTATES—See EXECUTORS AND ADMINISTRATORS.

When widow not entitled to her statutory allowance, see WILLS; *Whetsell, Adm., v. Loudon, Adm.*, 257.

Action by daughter against her father's estate for services rendered as housekeeper, see PARENT AND CHILD; *Williams v. Resener, Adm.*, 132.

Executors and Administrators. — Claims. — Complaint. — Parties.—Available error cannot be predicated upon the action of the court in overruling a demurrer to an amended complaint filed by a claimant upon transfer of claim to the issue docket because of the failure of the complaint to name the administrator as a party, since the administrator became a party by operation of law.

Bowman, Adm., v. Citizens' Nat. Bank, 38.

DEEDS—A covenant of a railroad company to maintain a fence along right of way runs with the land. See COVENANTS; *Lake Erie, etc., R. Co. v. Griffn*, 138.

DEMAND—A demand need not be pleaded in action for wages due under a contract, see ACTION, 8; *Hartford Life Ins. Co. v. Bryan*, 406.

DEMURRER—See PLEADING.

DEPOSITIONS—Admission of in evidence when taken in another cause under an alleged agreement, see TRIAL, 10; *Gemmill v. Brown*, 6.

By whom read in evidence, see TRIAL, 9; *Ib.*

DOGS—Indictment under act of 1897 for keeping or harboring dog without holding tax receipt, see **CRIMINAL LAW**, 1; *State v. Thompson*, 581.

DRAINS—Damages to stock resulting from negligence in cleaning drain, see **NEGLIGENCE**, 1, 2; *Sprankle v. Bart*, 681.

EJECTMENT—A farm hand who is furnished a dwelling-house as part pay is not a tenant. See **TRESPASS**, 1; *Heffelfinger v. Fulton*, 33.

ESTOPPEL—

Payment. — Gravel-Road Certificates.—Pleading.—In an action on a gravel-road certificate by the assignee, the defendant answered that his assessments, on which the certificate was issued, had been paid by him in labor and material furnished in the construction of the road abutting his lands, under an agreement with the gravel-road contractor, with the knowledge and consent of the superintendent. Plaintiff replied that it had been the owner of the certificate for ten years and that defendant had made payments of interest thereon during such time, and asked for extension of time, and failed to inform plaintiff of the payment claimed to have been made by him to the contractor until it was too late to bring suit against the superintendent. *Held*, that the facts pleaded by the reply were sufficient to constitute an estoppel to the defense pleaded by the answer. *Farmers' Bank v. Orr*, 71.

EVIDENCE—See **DEPOSITIONS**; **WITNESSES**.

Burden of proof, see **RAILROADS**, 4; *Terre Haute, etc., R. Co. v. Pruitt*, 227; **WAREHOUSEMEN**, 2; *Holt Ice, etc., Co. v. Arthur Jordan Co.*, 314.

Cross-examination of character witness, see **TRIAL**, 8; *Baehner v. State*, 597.

Circumstantial evidence, see **GAMING**, 3, 4; *Roberts v. State*, 366; *Neeld v. State*, 603.

Character evidence, see **TRIAL**, 3, 4; *Baehner v. State*, 597.

As to opinion evidence, see **TRIAL**, 5; *City of Ft. Wayne v. Patterson, Adm.*, 547.

Introduction in evidence of lease containing defective description of real estate, see **LANDLORD AND TENANT**, 9; *Indianapolis Nat. Gas Co. v. Pierce*, 116.

Sufficiency of evidence to show agreement to marry, see **BREACH OF MARRIAGE PROMISE**, 1; *Lauer v. Schmidt*, 54.

Evidence in action on note that the note was delivered to agent of payee under an agreement that it should not be delivered until signed by another person is inadmissible, see **BILLS AND NOTES**, 3; *Cooper v. Merchants', etc., Bank*, 341.

Only the grounds of objection presented to the trial court can be considered on appeal as against the ruling of the court. See **APPEAL AND ERROR**, 32; *Everitt, Seedsman, v. Indiana Paper Co.*, 287.

EVIDENCE—Continued.

A cause will not be reversed because of the action of the court in excluding testimony if the ruling can be sustained on any theory.

See APPEAL AND ERROR, 81; *Haas v. Cones Mfg. Co.*, 469.

1. *Privileged Communications.—Attorney and Client.*—In the trial of an action by a stenographer for services rendered in furnishing copies of evidence used in the trial of a cause, evidence by an attorney, who was acting as clerk for defendant's attorney in arranging and digesting the evidence, that defendant was present in court when the copies of the evidence were furnished and used, is not privileged. *Miller v. Palmer*, 357.
2. *Attorney and Client.*—In an action by a court reporter for services rendered in furnishing a litigant copies of evidence to be used in the trial of his cause, evidence as to the amount such litigant paid his attorney as tending to show that the attorney was to pay for such services was properly rejected, since any agreement between defendant and his attorney relative to compensation, unknown to plaintiff, could not affect her claim. *Ib.*
3. *Expert Testimony.—Railroads.*—The testimony of an experienced railroad man as to the danger in running a train backward is admissible in the trial of an action for personal injuries received by a passenger who was injured while riding on a train run with the engine in the rear. *Chicago, etc., R. Co. v. Grimm*, 494.
4. *Contracts.—Customs and Usages.*—In an action on a contract to furnish a certain quantity of paper the "weight to be on basis of 87x48, 58 lbs., 500 sheets," evidence that such specification had a particular meaning to the paper trade, and that it was the usage, where a weight is specified, to include the weight of wrappings necessary safely to transport it, unless otherwise specified in the contract, was admissible as an aid in the interpretation of the contract. *Everitt, Seedsman, v. Indiana Paper Co.*, 287.
5. *Hearsay.—Bills and Notes.*—Evidence by a bank cashier in an action on a promissory note purchased by the bank, that the bank nor any of its officers had any knowledge of any defense to the note was hearsay, and inadmissible. *Cooper v. Merchants', etc., Bank*, 341.
6. *Standard Life Tables.—Personal Injuries.*—In an action against a city for personal injuries sustained by reason of the city's negligence, standard life tables may be introduced in evidence to show the probable duration of the plaintiff's life on the question of compensation, where the injuries are shown to be permanent. *City of Indianapolis v. Marold*, 428.
7. *Personal Injuries.—Mortality Tables.*—A judgment for personal injuries will not be reversed because of the admission of the testimony of a witness as to the expectancy of life at the age of plaintiff based upon the mortality table of a certain life insurance company, where the expectancy given by the witness was less than that given by standard mortality tables of which the Appellate Court takes judicial notice. *Chicago, etc., R. Co. v. Neff*, 107.
8. *Contracts.*—In the trial of an action by a subcontractor for extra work, the court erred in permitting a witness to testify as to the work plaintiff was required to do under the contract, when the original contract and plans and specifications were made a part of the contract, and were not ambiguous, indefinite or uncertain. *Brown v. Langner*, 538.

EVIDENCE—Continued.

9. *Contracts by Correspondence.—Harmless Error.*—In an action for a breach of contract of employment entered into by correspondence, the introduction in evidence of letters which passed between the parties prior to those in which the proposal was made and accepted was harmless, where there was nothing in such letters which would vary the contract sued upon.

Everitt, Seedsman, v. Bassler, 303.

10. *Notice.*—Where, in an action for the purchase price of goods sold, defendant claimed he had disposed of his store and business in connection therewith prior to the sale of the goods, evidence as to a publication of a notice of the sale of the store, in a newspaper, in the town in which the store was located, was properly excluded, it not being shown that plaintiff, a non-resident, had notice of such publication, or any opportunity of seeing a copy thereof.

Haas v. Cones Mfg. Co., 469.

11. *Affidavits.—Judgment.—Default.*—Where in a proceeding to set aside a judgment rendered by default defendant filed affidavits tending to show excusable neglect, mistake and inadvertence, and plaintiff filed counter-affidavits in conflict with the showing made by them, the rule applicable to oral evidence applies, and the conclusion of the court thereon will not be disturbed if it is supported by any evidence.

Masten v. Indiana Car, etc., Co., 175.

12. *Opinion of Witness.—Bastardy.*—Where on a trial for bastardy the relatrix testified that the acts of intimacy between her and the defendant took place in a room where a man and his wife were sleeping, and that defendant came to her quietly from an adjoining room while the others were asleep, it was proper for the wife, who as a witness for defendant stated that she did not hear him enter the room, to testify that she was easily awakened.

State, ex rel., v. David, 297.

13. *Cross-Examination.—Questions of Argumentative Character.*—Upon cross-examination of a witness, questions of a mere argumentative character which did not call for facts nor for opinions based upon facts within the knowledge of the witness or hypothetically assumed were improper, and the answers to such questions were rightly excluded. *Lake Erie, etc., R. Co. v. Griffin, 138.*

14. *Rebuttal.—Damages.—Railroads.*—Where, in the trial of an action against a railroad company for injuries received by a passenger caused by a collision of the train with a horse on the track, the defendant introduced evidence to the effect that the road was fenced, and stock was prohibited from running at large, it was proper for plaintiff to prove in rebuttal that stock was frequently seen on the road.

Chicago, etc., R. Co. v. Grimm, 494.

EXECUTORS AND ADMINISTRATORS—See DECEDENTS' ESTATES.

1. *Ex Parte Application for Letters of Administration.—Discretion of Court.*—Although the circuit court has a discretion in the granting or refusing applications for letters of administration, yet where the proceeding is *ex parte* and a verified application shows the party entitled to letters, they should be granted. *Ex Parte Jenkins, 532.*

2. *Letters May Be Granted Though No Tangible Assets.*—The right to letters of administration does not depend upon the existence of tangible assets to administer. Letters may be granted in order that an action may be prosecuted. *Ib.*

EXECUTORS AND ADMINISTRATORS—Continued.

3. *Letters of Administration to Prosecute Action on Official Bond of Sheriff for Permitting Death of Prisoner.*—Where a sheriff of a county permits a prisoner to be taken from the county jail and put to death, the widow of the deceased prisoner was entitled to letters of administration, although the only asset of such deceased prisoner's estate was the right of action on the official bond of the sheriff for breach of official duty, and such breach had occurred more than two years prior to the application for such letters. *Ib.*
4. *Letters of Administration Issued in Wrong County.*—Letters of administration issued in a county where property of decedent was situate, but other than the county in which decedent maintained his domicile at the time of his death, are not void but voidable only. *Razor, Adm., v. Mehl, Adm., 645.*
5. *Letters of Administration.—Revocation.*—Letters of administration issued in the county of which decedent was an inhabitant at the time of his death confer no authority to the one to whom they are issued to institute proceedings to revoke letters previously issued in another county. *Ib.*
6. *Decedents' Estates.—Insolvent Estates.—Claims Paid by Mistake.—Recovery by Administrator.*—Where an executor, acting under a misapprehension of the condition of the estate, and believing the same to be solvent, paid a general creditor in full, and it afterward developed that the estate was insolvent, an action may be maintained against the creditor to recover back the overpayment. *Tarplee v. Capp, Adm., 56.*
7. *Decedents' Estates.—Insolvent Estates.—Claims Paid by Mistake.—Recovery.—Complaint.*—A complaint against a creditor by the administrator of a decedent's estate to recover a certain per cent. of the amount paid the creditor on the belief that the estate was solvent is not bad for failing to allege that a final dividend had been ascertained and declared by the court in which the estate was pending for settlement, where it was alleged that all of the assets of the estate had been reduced to cash, stating the amount of assets and liabilities, the per cent. the estate would pay and the overpayment to defendant. *Ib.*
8. *Decedents' Estates.—Insolvent Estates.—Claims.—Recovery.—Pleading.*—An answer in an action by an administrator to recover a portion of a claim paid a creditor under the mistaken belief that the estate was solvent, to the effect that the assets of the estate within the year after the granting of letters testamentary, and at the time defendant's claim was allowed and paid, exceeded the aggregate amount of claims filed and allowed, and that claims were afterward wrongfully and illegally allowed which rendered the estate insolvent, does not constitute a defense to such action. *Ib.*
9. *Mortgages.—Personal Liability.—Interpretation by Parties.*—Where a mortgagee foreclosed a mortgage executed by an executor upon his decedent's estate, the act of foreclosure did not affirm the proposition that the debt was the debt of the decedent's estate and not that of the mortgagor so as to bind the mortgagee and prevent him from proceeding against the mortgagor personally for a deficiency in the payment of the debt by the sale of the mortgaged premises. *DeCoudres, Adm. v. Union Trust Co., 271.*
10. *Execution of Mortgage.—Personal Liability.*—A will gave the executor power to mortgage decedent's real estate to pay debts. The executor mortgaged the real estate without order of court

EXECUTORS AND ADMINISTRATORS—Continued.

and afterward reported the execution of the mortgage to the proper court and the same was approved. The mortgage was given to secure the payment of certain promissory notes executed by the executor as such. The mortgage referred to the power given by the will, and contained a personal covenant on the part of mortgagor to pay the sum secured. The proceeds derived therefrom were applied to the payment of the decedent's debts and the discharge of liens upon the real estate mortgaged. Default was made in the payment of the notes and the mortgage was foreclosed and the land sold for a sum less than the amount of the debt. *Held*, that the executor was personally liable for the deficiency. *Ib.*

EXEMPTIONS—In action on account, see PLEADING, 5; *Whitely, etc., Co. v. Bevington*, 391.

EXPERT TESTIMONY—See OPINION EVIDENCE.

Of civil engineer relative to the manner in which a street improvement was made, see MUNICIPAL CORPORATIONS, 6; *Fralich v. Barlow*, 383.

An experienced railroad man may testify as an expert as to the danger in running a train backward, see EVIDENCE, 8; *Chicago, etc., R. Co. v. Grimm*, 494.

FRAUDS, STATUTE OF—

Sheriff's Certificates.—Contracts of Sale.—A sheriff's certificate of sale of real estate represents an interest in the land, and a contract to sell or transfer such certificate is within the statute of frauds, and, to be enforceable, must be in writing. *Cox v. Roberts*, 252.

FORMER ADJUDICATION—Plea of in action in replevin, see PLEADING, 14; *Case v. Moorman*, 293. •

GAMING—

1. *Affidavit and Information.—Judgment.—Variance.*—Where an affidavit and information charges defendant with visiting a gambling house, a finding and judgment that "the defendant is guilty of frequenting a gambling house as charged" is sufficient, since the words "of frequenting a gambling house" are surplusage. *Roberts v. State*, 366.

2. *Visiting Gambling House.—Statute Construed.*—A single visit to a gambling house is a misdemeanor within the meaning of §2089 Burns 1894. *Ib.*

3. *Circumstantial Evidence.*—A finding that a particular room was a "gambling house," within the meaning of §2089 Burns 1894, will not be disturbed on appeal, where circumstances were shown from which the trial court could reasonably and legitimately infer such fact. *Ib.*

4. *Evidence.—Criminal Law.*—In a prosecution for keeping a room to be used and occupied for gaming it was shown that the room was located over a saloon, the furniture consisting of a round table with a muslin cover and a drawer, chairs, carpet and a lounge. The witnesses, two police officers, went to the room about two o'clock on Sunday morning and found seated around the table five or six men, some of whom were playing cards.

GAMING—Continued.

Poker chips and money were lying on the table, most of the chips being in front of one of the men playing. Some chips were placed in the middle of the table, and when a game was played defendant would "chip" off into the drawer; that the "pot" went to the man that won. *Held*, that the evidence was sufficient to support a conviction. *Neeld v. State*, 603.

GARNISHMENT—

Action on Bond.—Validity of Proceeding.—Estoppel.—Where a plaintiff instituted an action in garnishment before a justice of the peace, filed an affidavit and bond conditioned that he would prosecute his proceedings in garnishment to effect and pay all damages if such proceedings should be wrongful or oppressive, and procured the issuance of a writ of garnishment, he will be estopped from setting up the defense, in an action on the bond, that no affidavit in attachment was ever filed and the writ was improperly issued. *Davis v. Bickel*, 378.

GAS AND OIL LEASE—See LANDLORD AND TENANT.

GRAVEL ROADS—Action to collect gravel-road certificate, see PLEADING, 9, 10; *Farmers' Bank v. Orr*, 71.

HARMLESS ERROR—See PRACTICE; TRIAL.

Overruling motion to strike out argumentative denial, see PRACTICE, 2; *Home Ins. Co. v. Sylvester*, 207.

Sustaining demurrer to argumentative denial, see APPEAL AND ERROR, 85; *City of Huntington v. Boyd*, 250; *Burket v. Miller*, 110.

When error in overruling demurrer to complaint is cured by special findings, see APPEAL AND ERROR, 86; *Vestal v. Craig*, 573.

When sustaining demurrer to good paragraph of answer is harmless, see PRACTICE, 8; *Whiteley, etc., Co. v. Bevington*, 391.

Overruling Demurrer to Bad Paragraph of Complaint.—Where the special finding shows that sufficient facts were found therein upon which to render judgment under the averments of a good paragraph of complaint, the judgment will not be reversed because of the action of the court in overruling a demurrer to a bad paragraph. *Lake Erie, etc., R. Co. v. Hoff*, 239.

HIGHWAYS—See TURNPIKES AND TOLL ROADS.

INDICTMENT—For failure to pay tax on dog, see CRIMINAL LAW, 1; *State v. Thompson*, 581.

Of county commissioners for making allowance to county auditor for services as clerk of gravel-road commissioners, see CRIMINAL LAW, 2; *State v. Trueblood*, 437.

INFANTS—The time within which an action may be brought for death by wrongful act applies to infants as well as adults, see LIMITATION OF ACTIONS; *Elliott v. Brazil Block Coal Co.*, 592.

INJUNCTION—

Action on Bond.—In an action on an injunction bond, the original proceedings for an injunction will be held to have been discontinued, where it is shown by the evidence that the judgment procured by the plaintiff in the trial court was reversed and the temporary restraining order dissolved on appeal to the Supreme Court, and that the entry of judgment in the order-book of the trial court, upon the reversal, was the last step taken in the cause, and that the suit on the bond was not filed until nearly three years had elapsed since the rendition of the judgment, and not until every obligation, the performance of which the bond sued on was intended to secure, had been violated. *Burket v. Miller, 110.*

INSTRUCTIONS—See TRIAL.

Not applicable to evidence, see **ASSIGNMENT FOR BENEFIT OF CREDITORS**; *Shilling v. Braniff, 676.*

1. *May Contain More Than One Proposition of Law.*—An instruction is not bad because it embraces more than one proposition of law. *Gemmill v. Brown, 6.*
2. *Refusal to Give.*—There was no error in refusing instructions, where the court fully and correctly instructed the jury upon the same subject-matter; *Home Ins. Co. v. Sylvester, 207; Lake Erie, etc., R. Co. v. Keiser, 417.*
3. *Harmless Error.*—Where the verdict is right under the evidence, the cause will not be reversed because of an instruction given, which, when considered alone, was incorrect. *Miller v. Palmer, 357.*
4. *All Construed Together.*—If the instructions given, all taken together, state the law correctly, and are not calculated to mislead the jury, the judgment will not be reversed on appeal, though one or more of the instructions standing alone did not correctly state the law. *Gemmill v. Brown, 6.*

INSURANCE—See BENEFICIAL ASSOCIATIONS.

1. *Application. — Concealment of Facts. — Pleading.* — Where in an action on an insurance policy defendant answered that insured, in his application, concealed the fact that he had been treated and prescribed for by a physician for *la grippe*, which answers, by the terms of the application, were made material to the risk, a reply setting out the statute of the State in which the company was incorporated requiring good faith only on the part of an applicant unless such misrepresentation relates to some matter material to the risk, and alleging that the diseases for which the insured had been treated, which had not been disclosed in the application, were not serious and left no bad effect in his constitution, was not sufficient to avoid the answer. *Fidelity, etc., Life, Assn. v. McDaniel, 608.*
2. *Application.—False Representations.—Blanks Filled by Agent.*—Where an agent of an insurance company, while acting in the scope of his authority, fills the blanks of an application for insurance with a statement not authorized by the party who signs it, the wrong will be imputed to the company and not to the insured. *Home Ins. Co. v. Sylvester, 207.*
3. *Pleading. — Verification. — Non Est Factum.* — Where an insurance company in defense to an action on a policy filed an answer alleging false representations in the application, a reply thereto that the application was made by defendant's agent is not a plea of *non est factum* and need not be verified. *Ib.*

INSURANCE—Continued.

4. *Proof of Loss.—Waiver.*—Where an insurance company has been notified of a loss under a policy issued by it, and denies liability and refuses to pay, such action constitutes a complete waiver of proof of loss. *Ib.*
5. *Action.—Proof of Loss.—Waiver.*—An action on an insurance policy was not prematurely brought under a provision in the policy that the company would pay the loss within sixty days after receiving proof of loss where it was shown that notice of the loss was given more than sixty days before bringing suit, and the company at such time denied liability and refused to pay. *Ib.*
6. *Proof of Loss. — Waiver. — Evidence.* — In an action on an insurance policy evidence that defendant by its authorized agent and adjuster notified plaintiff that the company would not pay the loss and he need not bother them about it was sufficient to establish a waiver of proof of loss. *Ib.*
7. *Evidence.—Witnesses.—Opinion Evidence.*—Witnesses who were farmers and who had built and owned barns, knew their values, and were acquainted with plaintiff's barn, and its condition before the fire, were competent to testify as to the value of such barn, in an action for its loss by fire. *Ib.*

INTERROGATORIES TO JURY—See VERDICT.

Failure of jury to answer, see TRIAL, 14; *City of Ft. Wayne v. Patterson, Adm.*, 547.

INTOXICATING LIQUORS—

Illegal Sales.—Prosecution.—Evidence.—A judgment convicting defendant of the charge of selling intoxicating liquors in violation of law will not be reversed because the judgment was based on the evidence of two witnesses who were employed to obtain evidence of violation of law and purchased the liquor constituting the illegal sale, since the act of purchasing the liquor was no legal wrong, and it was for the jury to determine the truth of the testimony. *Baehner v. State*, 597.

JUDGMENTS—

In an action on the *quantum meruit* for work and labor there cannot be a recovery upon an express contract. *Everett v. Stuck*, 279.

Proceeding to set aside a judgment rendered on default, see PLEADING, 15; *Masten v. Indiana Car, etc., Co.*, 175.

A judgment in favor of a landlord for possession does not entitle him to the growing crops. See LANDLORD AND TENANT, 2; *Burket v. Miller*, 110.

Amount of judgment in bastardy proceeding is largely in discretion of court, see BASTARDS; *Jean v. State, ex rel.*, 339.

Review of action of court in setting aside judgment rendered on default, see APPEAL AND ERROR, 28; *Masten v. Indiana Car, etc., Co.*, 175.

1. *Corrections.*—Where a judgment for the collection of a street improvement assessment included the interest thereon to the date of the rendition of the judgment, and the clerk entered the same making it bear interest from the date of approval of final esti-

JUDGMENTS—Continued.

mate, such error cannot be reviewed in a motion for a new trial, but should have been presented by motion to modify the judgment.

Fralich v. Barlow, 383.

2. *Action to Set Aside Default.—Defect of Complaint in Original Action not Cured by Judgment.*—On appeal in an action to set aside a judgment taken by default, a fatal defect in the complaint in the original action is not cured by the finding of the court, since no trial was had.

Dougherty v. Wise, 398.

JUDICIAL NOTICE—

Animals.—Courts will not take judicial notice that coal, free in its constituent parts from poison, would not, if taken into the stomach of animals, have a tendency to produce death. *Sprankle v. Bart*, 681.

JURY—Action on account and in attachment may be submitted to, see TRIAL, 16; *Hartford Life Ins. Co. v. Bryan*, 406.

Misconduct of, see TRIAL, 17; *Aurora, etc., Turnpike Co. v. Niebrugge*, 567.

A judgment in an action on account will not be reversed because the jury took to their room the pleadings and papers in the case, see APPEAL AND ERROR, 80; *Haas v. Cones Mfg. Co.*, 469.

JUSTICES OF THE PEACE—Presumption as to jurisdiction, see COURTS; *Davis v. Bickel*, 378.

Correction of Transcript After Appeal.—Clerical errors in a transcript on appeal from a judgment of a justice of the peace may be corrected by the justice after appeal. *Cline v. State*, 331.

LANDLORD AND TENANT—A farm hand occupying house as part pay is not a tenant. See TRESPASS, 1; *Heffelfinger v. Fulton*, 33.

Available defenses without special plea in action by landlord for possession, see PLEADING, 12; *Ward v. Pittsburgh, etc., R. Co.*, 405.

Action for *mesne* profits, see REAL ACTIONS, 1, 2, 3; *Huncheon v. Long*, 530; *O'Reilly v. Long*, 529.

1. *Lease.—Rent Payable in Advance.—Notice to Quit.—Demand for Rent.*—Where a tenant from month to month by the terms of his lease is to pay his rent in advance, it is not necessary, in an action for possession for failure to pay rent when due, to prove notice to quit or a demand for the rent.

Ingalls v. Bissot, 130.

2. *Action for Possession.—Right to Growing Crops.*—A judgment in favor of a landlord for possession does not entitle him to the growing crops.

Burket v. Miller, 110.

3. *Sale of Real Estate.—Action for Possession—Parties.*—Where a landlord conveyed real estate in the possession of a tenant, an action for possession must be brought in the name of the grantee or owner, although it was agreed that the grantor was to deliver possession at the termination of the lease, and that the tenant was to continue as the tenant of grantor until such delivery.

Holliday v. Chism, 1.

LANDLORD AND TENANT—Continued

4. *Lease.—Assignment.—Action by Assignee.—Parties.*—Where the assignment of a lease was in writing indorsed thereon, the assignor is not a necessary party in action by the assignee for breach, although the original lease is lost.

Indianapolis Nat. Gas Co. v. Pierce, 116.

5. *Rent.—Payment.—Pleading.*—A complaint in an action for the second year's rent due under a gas lease, which, by its terms, shows that there was no rent due for the first year of the tenancy, is not rendered bad by reason of an averment "that the agreed advance payment of rental for the first year * * was duly paid by said defendants at the time said lease was executed."

Crosby v. Pierce, 108.

6. *Contracts. — Assignment. — Rents. — Complaint.* — A complaint alleged that defendants executed a contract wherein it was agreed that they should not remove their stock of goods until the rent then due and to become due should be paid, and that the stock should stand good for the rent, and that such contract was duly assigned to plaintiff; that defendants failed to comply with said contract in that the stock of goods was removed without the knowledge or consent of plaintiff and disposed of and delivered up to the purchaser, and refused to pay the rent, or apply the proceeds of the sales thereon. *Held*, that the complaint was indefinite, and was insufficient as based on an action for breach of contract, or for rent.

Vestal v. Craig, 573.

7. *Lease. — Assignment.* — An expired gas and oil lease, on which there is a stipulated sum due as damages for breach, is a mere chose in action, and not an interest in the land, and an assignment thereof need not be under seal. *Indianapolis Nat. Gas Co. v. Pierce, 116.*

8. *Assignment of Expired Gas and Oil Lease.—Action by Assignee.—Damages.*—The assignment of an expired gas and oil lease carries with it the right of action on such lease for damages stipulated for failure of lessee to drill well. *Ib.*

9. *Gas and Oil Lease.—Uncertainty of Description.—Evidence.*—In an action to recover upon a covenant of a gas and oil lease for the payment of a specified sum annually upon failure to drill wells, it was not error to admit in evidence the lease on the ground of uncertainty of description, where the land was described as thirty acres of a certain tract "excepting and reserving therefrom twenty acres, more or less, around the buildings, the boundaries of which shall be designated and fixed," and the lessor had designated such boundaries to the lessee's agent at the time the lease was executed.

Ib.

LEASE—Assignment of expired gas and oil lease carries with it the right of action for damages stipulated for failure of lessee to drill well. See **LANDLORD AND TENANT**, 8; *Indianapolis Nat. Gas Co. v. Pierce, 116.*

Assignment of gas and oil lease need not be under seal, see **LANDLORD AND TENANT**, 7; *Ib.*

Assignor not a necessary party in action by assignee for breach of lease, see **LANDLORD AND TENANT**, 4; *Ib.*

Uncertainty of description of leased premises, see **LANDLORD AND TENANT**, 9; *Ib.*

LIENS—Of attorney on judgment for fees, see **ATTORNEY AND CLIENT**, 2; *Peterson v. Struby*, 19.

Foreclosure of laborer's lien, see **WORK AND LABOR**, 2; *Advance Mfg. Co. v. Auch*, 687.

Tradesmen and Mechanics.—Common Law Lien.—Waiver.—Section 7268 *et seq.* Burns 1894 does not declare a lien, but provides the manner of enforcing a lien which a mechanic or tradesman has at common law, and under such statute a mill owner may enforce a lien on lumber, in his possession, for payment of his charges for sawing the same, and such lien is not limited to any given lot of lumber for the price of sawing the same, but extends to the quantity in his possession for any general balance due him, but where the mill owner voluntarily surrenders possession of lumber, such surrender operates as a waiver of the lien thereon.

Bierly v. Royse, 202.

LIFE INSURANCE—See **INSURANCE**.

LIMITATION OF ACTIONS—In action under coal mining statute for death of employe, see **ACTION**, 2; *Elliott v. Brazil Block Coal Co.*, 592.

Death by Wrongful Act.—Infants.—The provisions of §285 Burns 1894 limiting the time within which an action may be brought for death by wrongful act to two years applies to infants as well as to adults. *Ib.*

MALICIOUS PROSECUTION—

1. *Evidence.—Financial Condition of Defendant.*—In the trial of an action for malicious prosecution, it was not error to admit evidence as to defendant's financial condition. *Atkinson v. VanCleave*, 508.
2. *Evidence. — Malice. — Advice of Lawyer.* — Where, in the trial of an action for malicious prosecution, defendant introduced evidence to show that he acted upon the advice of a lawyer in instituting the criminal prosecution, evidence that the person referred to did not hold himself out to the public as a lawyer was competent as tending to show that defendant acted upon the advice of one who was not a lawyer. *Ib.*
3. *Evidence.—Malice.—Advice of Lawyer.*—The fact that defendant in an action for malicious prosecution stated the facts to an attorney at law and sought his advice before instituting the criminal prosecution, is not conclusive evidence that he acted without malice, or that probable cause existed. *Ib.*
4. *Probable Cause. — Instructions.* — Where, in an action for malicious prosecution, the facts necessary to constitute probable cause were controverted, it was proper for the court to inform the jury that certain facts, if proved, would not constitute probable cause. *Ib.*

MANDAMUS—

When Trial Judge Not Compelled to Sign Bill of Exceptions.—A trial judge will not be compelled by writ of mandate from the Appellate Court to sign, or correct and sign, a bill of exceptions tendered to him, where there is a bill prepared and signed by him in the record, although the bill prepared and signed by him was not signed and filed within the time originally given by the court. *Bogue v. Murphy*, 102.

MASTER AND SERVANT—See CARRIERS; MUNICIPAL CORPORATIONS; RAILROADS.

Rules governing employes, see RAILROADS, 3, 4; *Terre Haute, etc., R. Co. v. Pruitt*, 227.

Farm hand a servant not a tenant. See TRESPASS, 1; *Heffelfinger v. Fulton*, 33.

Liability of corporation for negligent failure to provide medical services to employe as per agreement, see DAMAGES, 1; *American Tin-Plate Co. v. Guy*, 588.

The violation of a statutory duty by defendant does not relieve plaintiff from showing, in an action for personal injuries, that he exercised due care, see NEGLIGENCE, 3; *Bodell v. Brazil Block Coal Co.*, 654.

1. *Failure of Master to Keep Machinery in Repair.—Injury to Servant.—Complaint.*—In an action by a servant for damages for personal injuries caused by the negligence of master to keep machinery in repair, a complaint describing the defects of the machinery, but containing no averment that the want of repair causing the injury was that to which the negligence was charged, is insufficient.

LaFayette Carpet Co. v. Stafford, 187.

2. *Injury to Servant.—Defective Machinery.—Complaint.*—In an action by a servant for injuries caused by an uncovered and defective yarn-drying machine, a complaint alleging that plaintiff was eighteen years of age, was uninstructed as to the dangerous condition of the machine, and that the working place was a narrow passageway in which it was difficult to see because of dense steam, but which failed to aver that plaintiff was ignorant of the conditions, or that defendant knew plaintiff's age, inexperience and ignorance of the conditions, is insufficient. *Ib.*

3. *Defective Machinery.—Complaint.—Contributory Negligence.*—In an action by a servant for injuries the complaint alleged that while plaintiff was in the performance of his duties, without any negligence on his part, certain yarn carried by plaintiff was caught in defective and uncovered yarn-drying machinery pulling his arm against such machinery and twisting it off. *Held*, insufficient for the reason that the allegations that the plaintiff was free from contributory negligence only showed freedom from fault up to the time the yarn was caught, and not to the time of the injury. *Ib.*

4. *Personal Injuries.—Complaint.—Contributory Negligence.*—A complaint against a railroad company by an employe for personal injuries received while coupling cars, by stumbling over rubbish permitted by defendant to accumulate upon the tracks, alleging that plaintiff notified defendant six weeks before the injury to remove the obstruction, and, not being in a position to see the obstructions, believed defendant had removed same, shows actionable negligence on the part of defendant and that plaintiff was without fault contributing to his injury.

Pittsburgh, etc., R. Co. v. Elwood, 671.

5. *Negligence.—Complaint.*—In an action against a city for damages, the complaint set forth that plaintiff's intestate was employed by defendant city to assist in the digging of a trench six and one-half feet deep, preparatory to the laying of water-mains; that while intestate was thus engaged at a point where the ground was compact and hard, he was directed by defendant's superintendent to go to another point, where the trench had been dug by other workmen, to dig bell-holes in the bottom of the trench, and

MASTER AND SERVANT—Continued.

where the banks or walls of the trench were composed of earth of a loose and unadhesive character, which fact was unknown to deceased, but well known to the defendant; that without any fault on the part of the deceased the trench caved in, causing bodily injuries from which death resulted. *Held*, that the complaint stated a good cause of action. *City of Ft. Wayne v. Patterson, Adm., 547.*

6. *Action by Quarry Employe for Personal Injuries.—Fellow Servant.*—Plaintiff was employed to keep the floor of a quarry tunnel free from small rocks, under the direction of defendant's foreman. The rocks to be cleared away were such as would be thrown out from time to time by blasting. Two days before plaintiff was injured, a large rock was thrown out by a blast and was supported in a dangerous position by smaller rocks thrown out in the same manner. Some of the loose rocks supporting the large one were removed by the foreman, and while plaintiff was working in the line of his duty the stone fell on and injured him. *Held*, that the foreman was a fellow servant of plaintiff, and that there could be no recovery. *Ross v. Union Cement, etc., Co., 463.*

7. *Employe Acting Under Orders.—More Hazardous Employment.*—The rule that where a master orders a servant to do something not contemplated in his employment it does not necessarily follow that the servant either assumes the increased risk or is negligent in obeying the order although the risk is equally open to the observation of both, can only apply where the servant is ordered from his usual employment, temporarily, to do something not connected therewith. *Morewood Co. v. Smith, 264.*

8. *Railroads.—Negligence.—Instructions.*—An instruction in an action against a railroad company for personal injuries to a brakeman caused by the alleged negligence of defendant in maintaining a defective hand-hold on the side of a car which gave way when in proper use by plaintiff, wholly ignoring plaintiff's knowledge of the defect or danger, and authorizing a verdict for plaintiff even though the plaintiff had knowledge of the defect and danger, or could have had such knowledge by the exercise of ordinary care, was erroneous. *Terre Haute, etc., R. Co. v. Pruitt, 227.*

9. *Contributory Negligence.—Safe Place to Work.*—Where a person employed by a city to assist in the digging of a trench six and one-half feet deep, preparatory to the laying of water-mains, was engaged at the work at a point where the walls of the trench were solid and firm, and was ordered to another part of the trench, dug by other workmen, where the walls of the trench were composed of gravel and loose earth, the fact that in getting from one point to the other the employe walked along the bottom of the trench and had good opportunity to notice the difference in the character of the walls was not sufficient to charge him with contributory negligence, since he had a right to assume, in the absence of warning or notice, that the city had furnished him a safe place to work. *City of Ft. Wayne v. Patterson, Adm., 547.*

10. *Answers to Interrogatories.—General Verdict.—Conflict.*—Where an employe of a city was digging bell-holes at the bottom of a deep water-main trench dug by other workmen, and was killed by the caving in of the walls because not properly braced, answers to interrogatories propounded to the jury showing that the deceased was experienced to some extent in such work, and that by the exercise of his senses of sight and feeling he could have learned of the danger, are not in such conflict with a general verdict in favor of the plaintiff as to render such general verdict erroneous. *Ib.*

MECHANIC AND TRADESMAN—Enforcement of common law lien, see **LIENS**; *Bierly v. Royse*, 202.

MESNE PROFITS—

An action for *mesne* profits may be maintained independently of an action for the possession of the real estate. See **REAL ACTIONS**, 3; *O'Reilly v. Long*, 529.

Complaint for *mesne* profits, see **REAL ACTIONS**, 2; *Ib.*

An action may be maintained, after the surrender of possession to plaintiff, for the rents and profits of land during the wrongful holding by defendant. See **REAL ACTIONS**, 1; *Huncheon v. Long*, 530.

MINES AND MINERALS—An action for death of coal mine employe must be brought within two years. See **ACTION**, 2; *Elliott v. Brazil Block Coal Co.*, 592.

Action by coal mine employe for injuries resulting from failure of company to keep cage used in mine securely covered as required by statute, see **NEGLIGENCE**, 4; *Bodell v. Brazil Block Coal Co.*, 654.

Death by Wrongful Act.—Statute Construed.—Parties.—Under the act of 1891 (Acts 1891, p. 57) relating to coal mining, vesting the right of action for recovery for death of employe in certain persons therein named, the administrator of a deceased employe of a coal mining company, operated under the provisions of said act, cannot maintain an action for the death of such employe caused by the caving in of the mine. *Boyd v. Brazil Block Coal Co.*, 157.

MORTALITY TABLES—As showing expectancy of life in action for personal injuries on question of compensation, see **EVIDENCE**, 6, 7; *City of Indianapolis v. Marold*, 428; *Chicago, etc., R. Co. v. Neff*, 107.

MORTGAGES—Personal liability of executor in execution of mortgage on decedent's real estate, see **EXECUTORS AND ADMINISTRATORS**, 9, 10; *De Coudres, Adm. v. Union Trust Co.*, 271.

MOTIONS—Joint motion for new trial on account of insufficiency of evidence to sustain verdict, see **NEW TRIAL**, 8; *Whiteley, etc., Co. v. Bevington*, 391.

MUNICIPAL CORPORATIONS—

1. *Proceedings of Council.—Members Present.—Passage of Ordinance.—Vote.—Street Improvements.*—In a proceeding to collect a street improvement assessment the record of the proceedings of the common council shows that at the time the ordinance was passed six members were present, presided over by the mayor, and the ordinance was adopted by an unanimous vote. At the next meeting of the council, when bids were received, the record shows that six councilmen were present, and does not show that any were absent. At a subsequent meeting, when a final estimate was ordered, the record shows that five members were present and one absent. At other meetings, when the street improvement was

MUNICIPAL CORPORATIONS—Continued.

considered, the record shows that the six councilmen were present or one of them absent, and no other councilmen are mentioned as being present or absent. *Held*, that the record conclusively shows that the city council was composed of six members and that the ordinance was passed by a two-thirds vote of all the members of the council. *Fralich v. Barlow*, 383.

2. *Street Improvements.—Collection of Assessments.—Complaint—Precept.—Partial Estimate.*—A complaint by precept to enforce the collection of a street improvement assessment is not bad for failing to show that the work was completed, since under §3627 Burns 1894 partial estimates may be made and enforced. *Ib.*
3. *Street Improvements.—Collection of Assessments.—Evidence.—Harmless Error.*—In an action for the collection of a street improvement assessment the admission in evidence of the record entry of the council showing an allowance and order of payment to the contractor for the city's portion of the cost of the improvement was harmless error. *Ib.*
4. *Street Improvements.—Collection of Assessments.—Evidence.—Record of Proceedings.*—The record of the common council relative to a street improvement, from the passage of the ordinance to and including the final estimate of the engineer, is admissible in evidence in an action to enforce the collection of a street improvement assessment. *Ib.*
5. *Street Improvements.—Plans and Specifications.—Complaint.*—A complaint for the collection of a street improvement assessment is not bad for failure to show that the council adopted the plans and specifications for the improvement, where the ordinance provides for the plans and specifications, and fully describes the character and nature of the improvements. *Ib.*
6. *Street Improvements.—Collection of Assessments.—Evidence.—Civil Engineer.—Expert Testimony.*—The evidence of the civil engineer relative to the manner in which a street improvement was made was admissible in an action to enforce an assessment lien. *Ib.*
7. *Street Improvements.—Collection of Assessments.—Evidence.—Compromise and Settlement.*—In an action to enforce a street improvement assessment the testimony of another property owner along the street improved relative to a statement made to him by the contractor in regard to the completion of the improvement made in connection with a compromise and settlement between such parties was properly rejected. *Ib.*
8. *Repair of Street by Independent Contractor.—Negligence of City.*—A street was being improved by independent contractors. It became necessary to lower a bridge forming part of the street so as to correspond with the new grade. One end of the bridge was raised several inches in order that the abutment might be cut down. While the bridge was thus raised the workmen employed by the contractors placed a block at the end of the bridge, making a step for footmen who continued to cross. During the time the bridge and street were being repaired the plaintiff passed over the bridge several times, using the block as a step in descending therefrom. At dusk on a certain evening, about two hours after plaintiff had thus crossed the bridge in safety, he attempted again to cross. No lights or barriers having been placed at the bridge, the plaintiff fell and was injured. *Held*, that the city was liable. *City of Indianapolis v. Marold*, 428.

MUNICIPAL CORPORATIONS—Continued.

9. *Negligence.—Complaint.*—In an action against a town for damages, the complaint contained allegations showing that in the night-time plaintiff, while riding in a wagon drawn by gentle horses, driven by a careful driver, was, without any fault on his part, thrown from the wagon and injured because of the defective construction of a bridge near the crossing of the two principal streets of the town; and that the defects in the bridge were known to the town, and unknown to the plaintiff and those with her. *Held*, that the complaint stated a cause of action.
Town of Odon v. Dobbs, 522.
10. *Streets Must Be Kept In Safe Condition.*—It is the duty of a town to keep its streets in reasonably safe condition, not alone in the center, but from curb to curb. *Ib.*
11. *Street Improvements.—Bonds.—Foreclosure.*—Where a property owner pays an instalment of a street improvement assessment which has been made and placed upon the tax duplicate under §4290 *et seq.* Burns 1894, the treasurer's receipt discharges the lien of the assessment to the extent of the payment, and the holder of a bond issued on account of such improvement cannot maintain an action to foreclose the lien of the assessment because of the failure of the treasurer to pay such instalment to the owner of the bond.
Jessen v. Pierce, 222.
12. *Sewers.—Construction.—Declaratory Resolution.*—A resolution declaring the "desirability of, and ordering the construction of a sewer," is a substantial compliance with the statute as to the declaration of necessity, since by ordering the improvement made the council necessarily determines the necessity thereof.
Spaulding v. Baxter, 485.
13. *Sewers.—Assessments.—Complaint.*—A complaint to enforce a sewer assessment lien is not bad as failing to show that the contract for the improvement was let to the best bidder, where it is averred that notice was published calling for bids, and afterwards the bid of a person named was accepted. *Ib.*
14. *Sewers.—Resolution.—Notice.*—An assessment made for the construction of a sewer is not invalid because of the failure of the council to adopt a resolution of necessity and give notice thereof as provided by §4289 Burns 1894, where notice was given for hearing objections to the final estimates as provided by §4294 Burns 1894. *Ib.*
15. *Sewers.—Assessments.—Estoppel.*—Where a sewer was constructed under a resolution providing that the cost thereof should be paid from the general fund of the city, a property owner who was benefited by the improvement and stood by and permitted the work to proceed without objection is not thereby estopped from contesting the validity of an assessment against his property made after the work was completed, accepted, and paid for in the manner provided for in the resolution and contract. *Ib.*
16. *Sewers.—Assessments.*—A resolution for the construction of a sewer provided that the entire cost thereof should be paid from the general fund of the city, and the clerk was ordered to advertise for bids, conditioned that the contractor should accept the obligation of the city in payment for the work. After the completion of the work it was ascertained that the city was indebted beyond the constitutional limit, and to relieve the city from the debt, and give the contractor better security, the city made a new and different estimate, and assessed the cost thereof to the property owners. *Held*, that the assessments were invalid. *Ib.*

MUNICIPAL CORPORATIONS—Continued.

17. *Sewers.—Enforcement of Assessments.—Complaint.*—A complaint to enforce the collection of an assessment for the construction of a sewer must show that a proper petition for the improvement was presented, or that the resolution for the improvement was concurred in by two-thirds of the members of the city council.

Burris v. Baxter, 536.

NATURAL GAS—See LANDLORD AND TENANT.

NEGLIGENCE—See CARRIERS; CONTRIBUTORY NEGLIGENCE; DAMAGES; MASTER AND SERVANT; RAILROADS.

Of carrier in an action for injury of passenger by derailment of train, see CARRIERS, 1; *Chicago, etc., R. Co. v. Grimm, 494.*

Of city in making repairs to streets, see MUNICIPAL CORPORATIONS, 8; *City of Indianapolis v. Marold, 428.*

Of town in maintenance of bridge, see MUNICIPAL CORPORATIONS, 9; *Town of Odon v. Dobbs, 522.*

Where defendant negligently ran its locomotive through the streets of a town and struck a man and hurled his body against plaintiff, and injured him, the injury was not the proximate result of defendant's negligence. See DAMAGES, 8; *Evansville, etc., R. Co. v. Welch, 308.*

1. *Cleaning Drain.—Damages to Stock on Lands Outside the Line of the Ditch.*—That one has the right to go upon the lands of another for the purpose of dredging or cleaning a ditch does not relieve him for acts of negligence committed upon the lands outside the lines of the ditch.

Sprankle v. Bart, 681.

2. *Complaint.—Contributory Negligence.*—In an action for damages resulting from acts of negligence committed in cleaning a drain, on lands outside the line of the ditch, an allegation in the complaint "that by reason of said careless, negligent, and unlawful acts of said defendant, which were without fault or negligence on plaintiff's part," sufficiently negatives contributory negligence on the part of plaintiff.

Ib.

3. *Violation of Statutory Duty.—Contributory Negligence.—Damages.—Master and Servant.*—In an action by a coal mine employe for personal injuries caused by a breach of the statutory provision requiring the cages used in mines to be securely covered, the mere fact that there was a violation of a statutory duty does not relieve plaintiff from showing that he exercised due care.

Bodell v. Brazil Block Coal Co., 654.

4. *Violation of Statutory Duty.—Action.—Mines.—Damages.—Master and Servant.*—An action may be maintained for injuries sustained by a coal mine employe caused by the failure of the company to keep cage used in mine securely covered as required by §7469 Burns 1894, although the employe was not ascending or descending the shaft when injured.

Ib.

5. *Question of Fact.—Railroads.*—The question as to whether a railroad company was guilty of negligence in running a passenger train with the locomotive in the rear was properly submitted to the jury, in an action by a passenger for personal injuries, caused by the train striking a horse on the track.

Chicago, etc., R. Co. v. Grimm, 494.

NEGLIGENCE—Continued.

6. *Proximate Cause.—Railroads.*—The negligence of a railroad company in running a train with the locomotive in the rear was the proximate cause of an injury to plaintiff while a passenger thereon, caused by the train striking a horse on the track. *Ib.*
7. *In Construction of Swimming Pool at Public Park.—Action for Death.—Complaint.*—In an action by a parent for the death of a son, the complaint alleged that a railroad company, for which the defendant was acting as receiver, owned and operated for profit a park; that located in the park was a body of water held out to the public as a suitable place for bathing, swimming, and diving; that defendant had negligently left concealed under the surface of the water certain timbers; that plaintiff's son, desiring to bathe in the water thus provided, and, being ignorant of the concealed timbers, leaped head foremost into the water, striking the timbers, sustaining injuries from which death resulted; that the defendant was conducting the business of the park under the order and direction of the court. *Held*, that the complaint stated a good cause of action. *Bass, Rec., v. Reitdorf, 650*
8. *Contributory Negligence.*—The receiver of a railroad company was operating for profit a public park owned by such company, in which park there was a body of water held out to the public as a suitable place for bathing. A plank walk with rope barriers about three feet high was thrown around a portion of the bathing place, forming an inclosed pool. Notices were posted in conspicuous places in the adjoining bath-house as follows: "Bathers who are not good swimmers must not go outside of the pool. Good swimmers do so at their own risk." A boy sixteen and one-half years old, able to read the English language, an active diver and swimmer, stood on the walk and dived over the guard rope into the water outside the pool. His body came in contact with obstructions concealed beneath the water, and unknown to him. *Held*, that the boy was guilty of such contributory negligence as to bar a recovery for his death resulting therefrom. *Ib.*

NEW TRIAL—When not granted for misconduct of jury, see **TRIAL**, 17; *Aurora, etc., Turnpike Co. v. Niebrugge, 567.*

That certain special findings are inconsistent with other findings is not a reason for a new trial. *Peterson v. Struby, 19.*

1. *Newly Discovered Evidence.*—A new trial will not be granted on account of newly discovered evidence, unless such evidence would be competent upon a second trial of the case. *Campbell v. Nixon, 90.*
2. *Newly Discovered Evidence. — Affidavit. — Diligence.*—A statement in an affidavit in support of a supplemental motion for a new trial on the ground of newly discovered evidence, that plaintiff "could not, with reasonable diligence, have discovered and produced said evidence at the trial of the cause, or at the time of filing said motion for a new trial of the same," is not a sufficient showing of diligence. *Ib.*
3. *Joint Motion.*—A joint motion for a new trial on account of the insufficiency of the evidence to sustain the verdict against defendants was properly overruled where the evidence was sufficient to sustain the verdict against any one of defendants.

Whiteley, etc., Co. v. Bevington, 391.

NOTES—See **BILLS AND NOTES**.

NOTICE—In appeal under §647 Burns 1894, see **APPEAL AND ERROR**, 10; *Hildebrand, Tr., v. Sattley Mfg. Co.*, 218.

When not necessary in action for possession of real estate to prove notice to quit, see **LANDLORD AND TENANT**, 1; *Ingalls v. Bissot*, 130.

NUISANCE—

Complaint.—Misjoinder of Parties.—In an action by two plaintiffs for the abatement of a nuisance, a complaint which expressly alleges that the plaintiffs were severally injured in sums specified is insufficient for want of sufficient facts. *Brownell v. Irwin*, 395.

OFFICERS—See **CONSTABLE**; **SHERIFF**.

An action at law cannot be maintained against a county treasurer for money owing by the county, see **COUNTIES**; *Heritage, Treas., v. Bronnenberg*, 692.

Attorney-General.—There is no constitutional or statutory inhibition against the Attorney-General practicing law.

Masten v. Indiana Car, etc., Co., 175.

OIL AND GAS LEASE—See **LANDLORD AND TENANT**.

OPINION EVIDENCE—See **EXPERT TESTIMONY**; **WITNESSES**.

Of farmers as to the value of barns, see **INSURANCE**, 7; *Home Ins. Co. v. Sylvester*, 207.

PARENT AND CHILD—

Services of Child After Majority.—Liability of Parent.—Failure of Proof.—In an action by a daughter against the administrator of her father's estate for services rendered her father as housekeeper after she became of age, it is proper for the trial court to direct a verdict for defendant where the evidence failed to show an express or implied contract to pay for such services.

Williams v. Resener, Adm., 132.

PARTIES—In action for abatement of nuisance, see **NUISANCE**; *Brownell v. Irwin*, 395.

In action by assignee of lease for breach of lease, see **LANDLORD AND TENANT**, 4; *Indianapolis Nat. Gas Co. v. Pierce*, 116.

Where a landlord conveyed real estate in the possession of a tenant, an action for possession must be brought in the name of the grantee, see **LANDLORD AND TENANT**, 3; *Holliday v. Chism*, 1.

The word co-parties as used in §647 Burns 1894, providing that a part of several co-parties may appeal and must serve notice of the appeal upon all the other co-parties, means parties to the judgment appealed from. See **APPEAL AND ERROR**, 10; *Hildebrand, Tr., v. Sattley Mfg. Co.*, 218.

When defect of parties is waived, see **PRACTICE**, 1; *Ayres, Rec.*, v. *Foster*, 99.

PAYMENT—

Plea of payment in action on gravel-road certificate, see **PLEADING**, 9; **ESTOPPEL**; *Farmers' Bank v. Orr*, 71.

A plea of payment to constitute a bar to an action must allege that the payment was made before the commencement of the action. *Ib.*

PLEADING—Plea of *non est factum*, see **INSURANCE**, 8; *Home Ins. Co. v. Sylvester*, 207.

In an action for wages due under a contract it is not necessary to allege a previous demand. See **ACTION**, 8; *Hartford Life Ins. Co. v. Bryan*, 406.

Answer in action on promissory note pleading suretyship and seeking discharge of surety because of extension of time of payment, see **PRINCIPAL AND SURETY**, 1; *Bowman, Adm. v. Citizens' Nat. Bank*, 38.

Amendment of after close of evidence, see **TRIAL**, 11; *Case v. Moorman*, 293.

1. *Anticipating Defense.—Bills and Notes.*—A complaint in an action on a promissory note alleging the execution of the note, its purchase by plaintiff, before maturity, for a valuable consideration, in the usual course of business, without notice of any defense, does not contain an anticipated defense.

Cooper v. Merchants', etc., Bank, 341.

2. *Bills and Notes.*—A complaint in an action on a promissory note is not defective in that it fails to refer to and identify the note, where the note is contained in the body of the complaint. *Ib.*

3. *Master and Servant.—Personal Injuries.—Defective Appliances.*—Where in an action for personal injuries to an employe caused by defective appliances it is shown by the complaint that the defect was open and obvious, and it is not shown that the complaining party had no opportunity to observe it, an averment of want of knowledge is insufficient. *Bodell v. Brazil Block Coal Co.*, 654.

4. *Complaint.—Action Against City by Patrolman for Salary.*—In an action against a city for salary due plaintiff as patrolman, the complaint alleged the appointment of plaintiff to the office of patrolman by the board of metropolitan police commissioners of such city "then and there duly appointed, organized, and acting as such under and in pursuance of the laws providing for such board." *Held*, that there was sufficient averment that the board was legally constituted to withstand a demurrer. *City of Huntington v. Boyd*, 250.

5. *Answer.—Counterclaim.—Exemptions.*—Where in an action on account defendants filed answers of set-off and counterclaim, and in the counterclaim alleged a promise on the part of plaintiff to execute a chattel mortgage on certain specified personal property to secure one of defendants as indorser, a reply thereto that plaintiff was a householder, and that all of his property was less in value than \$600, was good against demurrer, it not appearing that the property claimed as exempt was the property to be included in the mortgage, or that all of the defendants have any right to a specific performance of the promise. *Whiteley, etc., Co. v. Bevington*, 391.

6. *Counterclaim.*—In an action for money had and received defendant filed a counterclaim based upon a promissory note indorsed by payee and defendant, filed as an exhibit, alleging that the note was indorsed by the payee to defendant and "is now held by him," and at the solicitation of the maker, for the purpose of giving him credit, defendant indorsed the note and plaintiff received from the maker the amount named. *Held*, that the averments of the pleading, taken with the exhibit, are not sufficient to show a right of action in defendant as indorsee for value from the payee of the note, or as a surety who had paid the note for the maker. *Ib.*

PLEADING—Continued.

7. *Answer.—Payment.—Release.*—Where a general denial and plea of payment were pleaded, a demurrer was properly sustained to a paragraph of answer alleging that plaintiff for a valuable consideration released to defendant the cause of action sued upon. *Ib.*
8. *Payment.*—A plea of payment to constitute a bar to an action must allege that payment was made before the commencement of the action. *Farmers' Bank v. Orr, 71.*
9. *Payment.—Gravel-Road Certificates.*—A plea of payment in an action by the assignee of a gravel-road certificate to enforce the collection thereof must allege that payment was made before the certificate was assigned and before notice to defendant of such assignment. *Ib.*
10. *Payment.—Gravel-Road Certificates.*—An answer by defendant in an action by the assignee of a gravel-road certificate to enforce collection that he furnished gravel and performed certain labor in the construction of that part of the road abutting on his lands, under an agreement with the contractor that the same was to be applied in payment of his assessments, is insufficient, where no date was specified on which such contract was entered into, and it was not shown that the contract was made prior to the issue and sale of the certificate. *Ib.*
11. *Parties.—Cross Complaint.*—A cross-complaint by part of defendants, in an action on a promissory note, against the other defendants to recover from cross-defendants certain attorney's fees for which cross-plaintiffs were liable, and which cross-defendants by way of compromise and settlement of the original action had agreed to pay, is bad on demurrer, since the matters alleged therein are not germane to the complaint, and do not in any way affect the subject-matter of the original action. *Buscher v. Volz, 400.*
12. *Landlord and Tenant.—Action for Possession.—Defense.*—*Answer.*—In an action by a landlord to recover possession of real estate and damages for its unlawful detention, all matters of defense, except such as may not be given in evidence without plea in civil cases before justices of the peace, may be made available without being pleaded, and available error cannot be predicated upon the action of the court in sustaining a demurrer to an answer in such case asserting ownership of the leased premises and that the lease was procured through coercion. *Ward v. Pittsburgh, etc., R. Co., 405.*
13. *Abatement.—Filing of Plea After Cause at Issue.*—Under §402 Burns 1894, a plea in abatement may properly be filed after the cause is at issue, where the cause for abatement did not arise sooner. *Kokomo St. R. Co. v. Pittsburgh, etc. R. Co., 335.*
14. *Answer.—Former Adjudication.*—In an action in replevin an answer that the title to the property in question had been judicially determined against plaintiff's claim of ownership in an attachment proceeding in which trial plaintiff was present in person and by counsel to protect his interest in the property was good as against demurrer. *Case v. Moorman, 293.*
15. *Judgment.—Default.*—In a proceeding, under §399 Burns 1894, to set aside a default the original cause of action need not be set out, but merely the nature of the action and defense. *Masten v. Indiana Car, etc., Co., 175.*

PLEADING—Continued.

16. *Exhibit. — Appeal and Error.*—The want of an exhibit, when the pleading is not demurred to, is a defect which is regarded as cured by verdict. *Fidelity, etc., Assn. v. McDaniel, 608.*
17. *Recovery Only Upon Theory Declared Upon.*—In an action upon the *quantum meruit*, to recover for work and labor done, there cannot be a recovery upon an express contract. *Everett v. Stuck, 279.*
18. *Answer.—Demurrer.*—A demurrer to an answer in bar because "it does not state facts sufficient to constitute a cause of action" presents no question. *Hollis v. Roberts, 426.*

PRACTICE—See HARMLESS ERROR; PLEADING; TRIAL.

1. *Defect of Parties.—Waiver.*—Objection to a complaint on account of defect of parties, if not made ground for demurrer, or set up by way of answer in abatement, is waived. *Ayres, Rec., v. Foster, 99.*
2. *Harmless Error.*—Overruling a motion to strike out an argumentative denial is harmless error. *Home Ins. Co. v. Sylvester, 207.*
3. *Harmless Error.*—Sustaining a demurrer to a paragraph of answer is harmless, where all the material allegations thereof were contained in an amended answer by way of counterclaim. *Whiteley, etc., Co. v. Bevington, 391.*

PRINCIPAL AND SURETY—When adding words in blank space in bond released surety from liability thereon, see ALTERATION OF INSTRUMENTS; *Good Roads, etc., Co. v. Moore, 479.*

1. *Bills and Notes.—Pleading.—Answer.*—An answer, in an action on a promissory note, pleading suretyship and seeking a discharge of surety because of the extension of time of payment, must state the contract, including the promise and consideration, in such manner that the court may determine from the facts whether it is such a contract as precludes the creditor from enforcing payment against the principal until a specified period has expired. *Bowman, Adm., v. Citizens' Nat. Bank, 38.*
2. *Executors and Administrators.—Claims.—Amended Complaint.—Cross-Complaint.—Process.—Jurisdiction.*—Where a claim against a decedent's estate was transferred to the issue docket, and amended by making another person bound with the decedent in the contract a defendant in the action, and such defendant appeared and filed a cross-complaint, setting up his suretyship for decedent, and the administrator appeared and demurred to the amended complaint and was present by attorneys at the trial, the court had jurisdiction of the administrator upon the cross-complaint, although no process was issued thereon. *Ib.*

PROMISSORY NOTES—See BILLS AND NOTES.**PROXIMATE CAUSE—Running train backward was the proximate cause of an injury to a passenger caused by train striking a horse on the track, see NEGLIGENCE, 6; *Chicago, etc., R. Co. v. Grimm, 494.***

When defendant negligently ran its train through the streets of a town and struck a man, and hurled his body against plaintiff, and injured him, such injury was not the proximate result of defendant's negligence. See DAMAGES, 3; *Evansville, etc., R. Co. v. Welch, 308.*

RAILROADS—See CARRIERS; MASTER AND SERVANT; STREET RAILWAYS.

Delivery of goods to wrong person, see CONVERSION, 1, 2; *Cleveland, etc., R. Co. v. Wright*, 525.

As to whether a railroad company was guilty of negligence in running a train backward is a question of fact, see NEGLIGENCE, 5; *Chicago, etc., R. Co. v. Grimm*, 494.

Running train backward was the proximate cause of an injury to a passenger caused by train striking a horse on the track, see NEGLIGENCE, 6; *Ib.*

When defendant negligently ran its train through the streets of a town and struck a man and hurled his body against plaintiff, and injured him, such injury was not the proximate result of defendant's negligence. See DAMAGES, 3; *Evansville, etc., R. Co. v. Welch*, 308.

1. *Master and Servant.—Voluntary Relief Association.—Personal Injury.—Damages.*—Where an employe of a railroad company voluntarily became a member of a relief association conducted by such company, and agreed that if injured he would not seek double compensation by pursuing both the relief fund and his remedy at law against the company, the acceptance of the benefits from the relief fund to which he was entitled for an injury sustained constitutes a bar to an action at law against the company for the injury. *Pittsburgh, etc., R. Co. v. Elwood*, 671.
2. *Injury at Crossing.—Complaint.*—A complaint against a railroad company for personal injuries alleging that plaintiff approached defendant's tracks and stopped his horse and dray and listened to ascertain whether a train standing near was about to move, when an employe of defendant, in charge of the train, standing on the main track at the rear of the train, knowing plaintiff was about to cross the tracks and had stopped to listen, motioned with his hand for him to drive across the tracks, and that plaintiff, in attempting to cross the tracks as directed, was struck by the train, and injured, is insufficient, where it was not shown that such employe was acting in the line of his duty, or that he had any power or authority to bind the defendant by his act. *Pittsburgh, etc., R. Co. v. Adams*, 164.
3. *Rules Governing Brakemen.—Compliance With Rules Required.*—A rule promulgated by a railroad company requiring that brakemen "examine and know for themselves that hand-holds and other parts and mechanical appliances which they are to use are in proper condition; and, if not, to put them so, or report them to the proper parties, and have them put in order before using," is a reasonable rule, and a brakeman who is furnished and is acquainted with such rule has no right to presume without examination that the railroad company has done its duty in properly maintaining such appliances. *Terre Haute, etc., R. Co. v. Pruitt*, 227.
4. *Rules Governing Brakemen.—Instruction.—Burden of Proof.*—Where a brakeman was required by the rules of the company to examine and know for himself that all ladders, hand-holds and appliances which he was to use were in proper condition, and if not to put them so, it was erroneous, in an action by such brakeman for personal injuries caused by the giving way of a hand-hold, to in-

RAILROADS—Continued.

struct the jury that unless it was shown that the plaintiff had been given sufficient time to make the inspection, and provided with necessary tools therefor, he would not be bound by the rule, since by such instruction the plaintiff would be relieved of the burden the law places upon him to show his own want of knowledge of the defects. *Ib.*

5. *Fires.—Damages.—Contributory Negligence.*—Answers to interrogatories in an action against a railroad company for damages for property destroyed by fire escaping from defendant's right of way, to the effect that the fire was communicated to a pile of sawdust in the vicinity of plaintiff's buildings, and that plaintiff and his employes attempted to extinguish the fire, and, believing that it was extinguished, left the premises, and did not return to examine the same, but that the fire was not wholly extinguished, and continued to smoulder in the sawdust, and began to smoke and was thereafter seen by defendant's section men, who took measures to prevent it spreading, and, in five days thereafter, under an ordinary wind, spread to plaintiff's premises and destroyed his buildings, are not in irreconcilable conflict with a general verdict for plaintiff. *Lake Erie, etc., R. Co., v. Keiser, 417.*

6. *Breach of Covenant to Fence Right of Way.—Damages.—Rental Value of Land.*—Where the rental value of land was depreciated by breach of a covenant on the part of a railroad company to maintain a fence, the covenantee may recover therefor whether or not the lands were actually rented or offered for rent. *Lake Erie, etc., R. Co. v. Griffin, 138.*

7. *Action for Breach of Covenant to Fence Right of Way—Instructions.*—In an action against a railroad company for damages for the diminution of the rental value of lands caused by breach of covenant to fence its right of way, it is not error to refuse to instruct the jury that one other particular kind of loss, which might have been made the basis of damages, under another form of complaint, was not to be taken as a measure of damages. *Ib.*

8. *Covenant to Fence Right of Way.—Breach.—Damages.—Diminution of Rental Value.*—For breach of covenant to fence a right of way, such covenant having been made by a railroad company prior to the act of April 13, 1885, requiring railroad companies to fence rights of way, a landowner over whose farm the road is laid may recover as damages the diminution of the rental value of the farm caused thereby. *Henley and Wiley, JJ., dissent. Ib.*

REAL ACTIONS—

1. *Mesne Profits.—Possession.*—An action may be maintained, after the surrender of possession to plaintiff, for the rents and profits of land during the wrongful holding by defendant. *Huncheon v. Long, 550.*
2. *Action for Rents.—Complaint.*—A complaint in action for mesne profits which fails to allege that plaintiff was entitled to the possession of the real estate during the time he seeks to recover for the use and occupation is fatally defective. *O'Reilly v. Long, 529.*
3. *Mesne Profits.*—An action for mesne profits may be maintained independently of an action for the possession of the real estate. *Ib.*

RECEIVERS—Refusal of receiver to continue action previously brought may be pleaded in abatement. See **ABATEMENT**; *Kokomo St. R. Co. v. Pittsburgh, etc., R. Co.*, 335.

1. *Authority to Sue. — Pleading. — Evidence.*—Where the authority of the plaintiff to sue the defendant receiver was not properly questioned by answer, it was not necessary that such authority be shown in evidence on the trial of the cause. *Ayres, Rec. v. Foster*, 99.
2. *Appointment in Another State.—Foreign Corporation.—Attachment.*—A receiver appointed for a foreign corporation in another state does not thereby acquire such title to the property of the corporation situate in this State as to defeat an attachment subsequently issued at the instance of a creditor by a court in this State. *Gray, Rec., v. Covert*, 561.

ROADS—Failure of company to keep toll road in repair renders tolls uncollectible, see **CORPORATIONS**, 3; *Aurora, etc., Turnpike Co. v. Niebruggee*, 567.

SALES—See **VENDOR AND PURCHASER**.

1. *Title to Remain in Seller.—Remedy of Seller Upon Default.*—A seller of property, who retains the legal title in himself, cannot, upon default of payment, take possession of the property, sell or otherwise dispose of it, and then sue the purchaser for the balance of the purchase price. *Turk v. Carnahan*, 125.
2. *Rejection of Goods.—Possession by Vendee.—Pleading.*—In an action for goods sold and delivered defendant filed a special answer or counterclaim alleging that the goods were sold by sample and that under the agreement defendant had the right to reject inferior goods furnished; that inferior goods were delivered and defendant promptly rejected the faulty goods, notified plaintiff thereof and asked instructions as to what disposition should be made of the inferior goods, and that plaintiff refused to receive back the goods so rejected or to substitute acceptable goods therefor. *Held*, that the facts pleaded do not bring the case within the rule that when goods are kept by the vendee in his possession the presumption arises that the goods were of the kind bought and satisfied the contract of sale, and that the answer was good as against a demurrer for want of facts. *Tecumseh Fencing Mills v. Sweet, Dempster & Co.*, 284.
3. *Failure to Comply with Terms of Sale.*—Plaintiff bid off growing wheat at a certain price per acre at an administrator's sale. By the terms of the sale a credit was to be given until December the 25th, but the auctioneer announced that the purchaser of the wheat should pay one-half of the bill for a quantity of fertilizer used in the sowing of the wheat. Notes were prepared and delivered to plaintiff for signature covering the amount of the purchase. Plaintiff executed one of the notes with surety and returned them to administrator saying that his surety refused to sign the fertilizer note. The administrator returned the notes to plaintiff and afterwards sought to have the matter settled, but plaintiff stated that the notes were in the hands of his attorney. The clerk of the sale reported the wheat unsold. Plaintiff afterwards paid the fertilizer bill to the fertilizer company. *Held*, that the administrator was warranted in treating the wheat as unsold, and that plaintiff could not recover damages for failure to deliver the wheat. *Meek v. Beaver*, 576.

SEDUCTION—

1. *Complaint.—Plaintiff's Chastity.*—In an action for seduction the complaint need not aver the former chastity of plaintiff.
Gemmell v. Brown, 6.
2. *Complaint.—Promise of Marriage.*—A complaint for seduction, which alleges promise of marriage as one of the means employed by defendant to accomplish his purpose, is not bad for failure to aver that defendant failed and refused to keep that promise. *Ib.*
3. *When Several Acts of Intercourse Constitute the Elements of One Wrong.*—Where, in an action for seduction, successive acts of intercourse are shown to have occurred under a promise of marriage, and by arts, wiles, persuasions and solicitations on the part of the defendant, the several acts of intercourse may be regarded as constituting the elements of one wrong. *Ib.*
4. *Evidence of Prior Unchastity.—For What Purpose Admissible.*—In an action by a woman for her own seduction, evidence of specific acts of immorality on her part, prior to the time of the alleged seduction, is admissible in mitigation of damages, and as tending to show that she was not seduced. *Ib.*
5. *Evidence.—Financial Condition of Defendant.*—In an action by a woman for her own seduction, it is not error to permit the defendant to testify as to his financial condition. *Ib.*
6. *Measure of Damages.*—In an action for seduction the plaintiff may recover damages for her anguish of mind and her pain and suffering incident to the birth of a child, the fruit of such seduction. *Ib.*

SEWERS — Construction of, see MUNICIPAL CORPORATIONS, 12;
Spaulding v. Baxter, 485.

Enforcement of assessment lien, see MUNICIPAL CORPORATIONS, 13,
14, 15, 16, 17; *Spaulding v. Baxter, 485; Burris v. Baxter, 536.*

SHERIFF—Where a sheriff permits a prisoner to be taken from jail and put to death the widow of the prisoner was entitled to letters of administration, although the only asset of the estate was the right of action on the official bond of the sheriff for breach of official duty. See EXECUTORS AND ADMINISTRATORS, 3; *Ex Parte Jenkins, 632.*

SPECIAL FINDING—See VERDICT.

STATUTES—Repeal by implication. See TAXATION, 2; *City of Indianapolis v. Morris, 409.*

The provision of §3684 Burns 1894, rendering tolls uncollectible where toll roads are permitted to remain out of repair is binding upon turnpike companies incorporated by special acts of the legislature prior thereto. See CORPORATIONS, 3; *Aurora, etc, Turnpike Co. v. Niebruggee, 567.*

All statutes on the subject of death by wrongful act are *in pari materia*, and must be construed together, see ACTION, 2; *Elliott v. Brazil Block Coal Co., 592.*

When a new right or proceeding is created by statute, and a mode prescribed for enforcing it, that mode must be pursued to the exclusion of all others. *Boyd v. Brazil Block Coal Co., 157.*

STATUTORY CONSTRUCTION—For table of statutes cited and construed, see page xxix.

STENOGRAPHER—

Action for Services.—A litigant is not released from liability to a court reporter for copies of the evidence furnished him during the trial by such reporter by reason of the fact that he did not know that the services performed for him were such as were to be paid for in addition to her pay as reporter, since the duties of an official court reporter are fixed by statute, of which the litigant must take notice.
Miller v. Palmer, 357.

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS.

STREET RAILWAYS—

Personal Injuries.—Complaint.—A complaint against a street railway company for personal injuries charged that plaintiff and her husband were riding in a buggy, and, in attempting to cross defendant's track, their horse took fright, and became unmanageable; that when the horse was on the track in such frightened condition a car was approaching at a distance of from 200 to 400 feet, and plaintiff was in full view of the motorman; that plaintiff could not extricate herself from the buggy, and the horse and buggy could not be removed from the track, and that the car was run against plaintiff, without any attempt on the part of the servants in charge thereof to check the same, and injured her. *Held*, that the complaint stated a cause of action, and a demurrer thereto was properly overruled.
Citizens' Street R. Co. v. Damm, 511.

TAXATION—Prosecution under act of 1897 for failure to pay tax on dog, see CRIMINAL LAW, 1; *State v. Thompson, 581.*

1. *National Banks.*—A national bank cannot recover taxes paid by it on its real estate because the value thereof was not deducted from the valuation of the capital stock of the bank as required by §8471 Burns 1894, since the wrong, if any, was the overvaluation of the capital stock, which affected the individual stockholders, and not the assessment of the real estate as such to the bank.
Board, etc., v. First Nat. Bank, 94.
2. *Refunding Taxes Erroneously Assessed.—Statutes.—Repeal by Implication.*—The provision of §29 of the act of 1891 (Acts 1891 p. 153) that the assessment of property and the collection of taxes shall be made as now provided by law, and that all real estate not exempt from taxation, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes, does not repeal by implication §3157 R. S. 1881 giving the common council power to refund taxes erroneously assessed.
City of Indianapolis v. Morris, 409.
3. *Taxes Erroneously Assessed.*—In an action to recover taxes paid upon property which was exempt from taxation for certain purposes, under §3261 R. S. 1881, it is immaterial whether the payment was made voluntarily or involuntarily.
Ib.
4. *Farm Lands in City.—Repealed Statute.*—Section 3261 R. S. 1881 (Repealed in 1891.) relative to taxation of farm lands lying within the corporate limits of a city means that such lands shall not be taxed by the city for general city purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes.
Ib.
5. *Refunding Taxes Erroneously Assessed.—Statutes.—Repeal.*—The act of 1891 (Acts 1891, p. 398) repealing §3261 R. S. 1881, exempting farm lands from municipal taxation for certain purposes, provid-

TAXATION—Continued.

ing that such repeal shall not affect pending litigation, does not exclude others from instituting suits after such repeal for the recovery of taxes erroneously collected on such farm lands before the repeal of the statute. *Ib.*

6. *Farm Lands in City. — Recovery of Taxes Erroneously Collected.*—Plaintiff was the owner of a fourteen acre tract of land lying within the corporate limits of a city, and sought to recover taxes erroneously assessed and collected thereon. It appeared that the owner conveyed two lots of the land to his sons who built houses thereon, and two houses in addition were built on another portion thereof. The remainder of the tract, consisting of about thirteen acres, was separately inclosed, near the center of which was situated the dwelling-house of plaintiff, a stable, and a lawn 200 feet wide extending to the street. The remainder of the land was used for meadow and pasture. *Held*, that the property was farm land within the meaning of §3261 R. S. 1881, and should not be taxed at a higher rate than other farm land in the civil township. *Ib.*

TRESPASS—

1. *Ejectment. — Master and Servant. — Landlord and Tenant. — Forcible Entry and Detainer.*—Where plaintiff occupied a house and appurtenances as a part of the contract price for services to be performed by him as a farm hand, the relation of master and servant, and not that of landlord and tenant, existed, and when, for any cause, his contract of employment was ended, his rights in the premises ended, and an action could not be maintained by him against the owner of the premises for forcible ejection.
Heffelfinger v. Fulton, 33.
2. *Ejectment. — Master and Servant. — Landlord and Tenant. — Forcible Entry and Detainer.*—Section 7118 Burns 1894, relative to forcible entry and detainer, is not applicable to a case where the relation between the landowner and occupant is that of master and servant. *Ib.*

TRIAL—See INSTRUCTIONS; JURY; PRACTICE; VERDICT.

Cross-examination of witness, see EVIDENCE, 13; *Lake Erie, etc., R. Co. v. Griffin, 133.*

Attorney may bind client for services of stenographer, see ATTORNEY AND CLIENT, 1; *Miller v. Palmer, 357.*

1. *Improper Question Propounded by Judge.—Harmless Error.*—Where the defendant who is a witness in his own behalf answers an improper question asked by his own attorney, it is not reversible error for the trial judge to propound to the witness a question in line with the one previously asked by such attorney.
Cline v. State, 331.
2. *Witnesses.—Cross-Examination.*—The extent to which the cross-examination of a witness may be carried for the purpose of determining his credibility is within the discretion of the court, and a cause will not be reversed for such reason unless an abuse of discretion is shown.
Baehner v. State, 597; Home Ins. Co., v. Sylvester, 207.
3. *Criminal Law.—Character Witness.*—The character a defendant is permitted to introduce in evidence in the trial of a criminal charge is the character involved in the charge. *Baehner v. State, 597.*

TRIAL—Continued.

4. *Criminal Law.—Character Witness.*—Where, in a criminal prosecution, a witness, who had testified to defendant's good character, said on cross-examination that he had never heard any one speak about his character, it was proper to permit such questions to be asked as would disclose the facts on which the witness based his answer. *Ib.*
5. *Opinion Evidence.—Notice.*—In the trial of an action against a city for the death of an employe, caused by the caving in of a water-main trench, another person employed on the work at the same time was permitted to answer a question calling for a conversation had with the city superintendent, in which conversation witness had refused to do the work afterwards assigned to the deceased, for the reason that "it was not safe." *Held*, that the question was not objectionable as calling for an opinion of the witness, since it was adapted to show notice to the city.
City of Ft. Wayne v. Patterson, Adm., 547.
6. *Separation of Witnesses.—Violation of Court's Order.—Exclusion of Evidence.*—Where a witness disobeys an order of the court directing a separation of witnesses, a party, who is without fault, will not be denied the right of having such witness testify.
State, ex rel., v. David, 297.
7. *Witnesses.—Cross-Examination.*—The extent to which the cross-examination of a witness may be carried is largely within the discretion of the court, and a cause will not be reversed on account thereof unless it appears that such discretion has been abused to the injury of the complaining party. *Baehner v. State, 597.*
8. *Criminal Law.—Evidence.—Intoxicating Liquors.*—Where, in a prosecution for selling intoxicating liquors on Sunday in violation of law, a witness testifies that defendant's character as a saloon-keeper was good there was no error in permitting the witness to be asked on cross-examination whether he had ever heard about defendant running gambling in connection with the saloon. *Ib.*
9. *Deposition as Evidence.—By Whom Read.*—Where a party who took a deposition offered the same at the trial, but read only the examination in chief, it was not reversible error for the court to permit the party against whom the deposition was taken to read the cross-examination and re-cross-examination thereof, if the deposition was read in consecutive parts, and went to the jury as a whole.
Gemmill v. Brown, 6.
10. *Practice.—Admission of Deposition Taken in Another Cause Under Alleged Agreement.*—Where, on the trial of an action, a party seeks to introduce in evidence a deposition taken in another cause, upon an alleged agreement that the deposition should be so used, and the question as to whether or not such agreement had been made is submitted by means of affidavits and counter affidavits, the ruling of the trial court thereon will not be reviewed on appeal, unless it appears that the trial court abused its discretion. *Ib.*
11. *Pleading.—Amendment After Close of Evidence.*—In the trial of an action in replevin it was disclosed by the evidence that the property in question was involved in a former attachment suit and that plaintiff was present with his attorney and the defense therein made was that plaintiff was the owner of the property then in controversy, but it was decided in such case that it was the property of another. *Held*, that the action of the court in permitting defendant at the close of the evidence to file an additional paragraph of answer setting up such matters was not error. *Case v. Moorman, 293.*

TRIAL—Continued.

12. *Practice. — When Duty of Court to Direct Verdict.*—It is the duty of the trial court to direct a verdict in cases where there is an entire failure of proof as to any material fact, the establishing of which is necessary to the cause of action or defense.

Williams v. Resener, Adm., 132.

13. *Directing Verdict. — Bills and Notes. — Good Faith Purchaser. — Notice of Defenses.*—The court erred in directing a verdict for plaintiff in an action by an indorsee upon a promissory note, where the maker claimed an equitable defense thereto, and notice to the indorsee thereof, and there was evidence that the indorsee knew that there were instalments of interest due and unpaid at the time the note was purchased. Henley, J., dissenting.

Cooper v. Merchants', etc., Bank, 342.

14. *Failure of Jury to Answer Interrogatories.*—In the trial of an action against a city for the death of a person employed to assist in the work preparatory to the laying of water-mains, which death was caused by the caving in of the walls of a trench dug by other workmen, the following interrogatory, among others, was propounded to the jury: "If you answer that there was any secret, hidden, latent, or unexposed danger upon or along the line of said trench, state fully and clearly what it was." *Held*, that upon the failure of the jury to return an answer to the interrogatory, it was not error for the court to refuse to require such answer, since the interrogatory was too general in its nature.

City of Ft. Wayne v. Patterson, Adm., 547.

15. *Practice.—Appeal and Error.*—The time during the trial when a request for answers to interrogatories shall be made is largely within the discretion of the trial court, and the action of the court in refusing to permit the defendant to amend interrogatories after return of a general verdict, and before answers to interrogatories were returned, will not be disturbed on appeal, where no abuse of discretion is shown.

Fidelity, etc., Assn. v. McDaniel, 608.

16. *Jury.*—An action on account and in attachment is properly submitted to a jury for trial, since the attachment is not the foundation of the action.

Hartford Life Ins. Co. v. Bryan, 406.

17. *Misconduct of Jury.—New Trial.*—A new trial will not be granted on account of misconduct of jurors, unless it be made to appear affirmatively that the party complaining had no knowledge of such misconduct before the jury retired to consider their verdict.

Aurora, etc., Turnpike Co. v. Niebruggee, 567.

TURNPIKES AND TOLL ROADS—Failure to keep road in repair,
see CORPORATIONS, 3; *Aurora, etc., Turnpike Co. v. Niebruggee, 567.*

Action for Toll.—Instructions.—In an action by a turnpike company to recover tolls, to which the defendant pleaded as a bar to recovery, under §3684 Burns 1894, that the road was out of repair, it was proper for the court to inform the jury by proper instruction what constituted condition of repair or want of repair; whether such condition existed or not having been submitted to the jury in other instructions. It was also proper to instruct the jury that if, at any time, any one or more of the trips for which recovery was sought were taken, the road was in good repair, they should find for the plaintiff for the amount charged for such trip or trips. *Ib.*

VENDOR AND PURCHASER—See SALES.

1. *Contracts.—Rescission.—Recovery of Purchase Money.*—An action may be maintained by a vendee to recover payments made by him on a contract of purchase, where it is shown that there was a rescission of the contract by the mutual consent of the parties.

Fruits v. Pearson, 235.

2. *Contracts.—Assignment.—Liability of Assignee for Purchase Money.*—Plaintiff entered into an agreement with C. to convey to him certain described real estate upon the payment of notes executed for the purchase price, it being provided that upon failure to make any payment the contract should become a lease and the payments made should be applied as rental for the several terms between the times of payment, and that the covenants and agreements should extend to the assigns of the parties. The contract was assigned to defendant, who went into possession of the land, but did not assume the payment of the notes, and continued in possession until default was made in payment. *Held*, that although a liability existed for use and occupation, an action could not be maintained against assignee on the note.

Baltes Land, etc., Co. v. Sutton, 695.

VENUE—

- Number of Changes.*—When a party is granted one change of venue from the county, whether it is perfected or not, the party who asks it can have no other change.

Gemmill v. Brown, 6.

VERDICT—When duty of court to direct, see TRIAL, 12; *Williams v. Resener, Adm., 132.*

1. *Judgments.*—A verdict finding for plaintiff on his complaint in the sum of \$84.51, and for defendants on their set-off and counter-claim for \$200, and that plaintiff was entitled to have the amount assessed to him allowed to him under the exemption laws, as prayed for, is not double, since it was the duty of the jury to find upon the issues presented by the pleadings, and it was the duty of the court to give plaintiff judgment for \$84.50, and that he hold the same exempt from execution. *Whiteley, etc., Co. v. Bevington, 391.*
2. *Uncertainty.—Description of Property.*—In an action on account and in attachment a verdict for plaintiff in a named sum, and that he was entitled to have the property attached sold, without specifically describing the property, is not so uncertain that a judgment cannot be pronounced upon it.

Hartford Life Ins. Co. v. Bryan, 406.

3. *Answers to Interrogatories.*—A general verdict is a finding that all the facts necessary to establish the cause of action are true, and in no case is the party in whose favor the verdict is returned required to establish any part of his case by answers to interrogatories.

American Tin-Plate Co. v. Guy, 588.

4. *Special Findings.—Conflict.*—Answers to interrogatories in an action for personal injuries caused by collision with a street car showed that plaintiff and her husband were out driving, and, in attempting to cross defendant's track, their horse became frightened and balked on the track; that when the buggy stopped on the track the car was more than 100 feet away, and the motorman was in a position to see the peril of plaintiff, and could have stopped the car in time to have prevented the collision; that before the collision the motorman sounded the gong and turned off the power, then released the brake and allowed the car to proceed and strike the plaintiff; that plaintiff could have seen the car before attempting

VERDICT—Continued.

to cross the track, and stopped, and thus avoided the collision, if she had looked. *Held*, that the answers are not in irreconcilable conflict with a general verdict for plaintiff.

Citizens' Street R. Co. v. Damm, 511.

5. *Special Findings.—Conflict.—Evidence.—Railroads.—Personal Injuries.*—A special finding in an action against a railroad company for damages for personal injuries to plaintiff while a passenger on defendant's train, caused by the train striking a horse on the track, to the effect that the train was running at a speed of twelve miles an hour, over a safe track, well fenced, with good cattle-guards at crossings, safe cars and locomotive, in charge of competent men, when the horse suddenly sprang upon the track, fifteen or twenty feet in front of the train, and it was impossible to stop the train and avoid a collision, is not in irreconcilable conflict with a general verdict for plaintiff, where the evidence showed that the train was being run backward, with a light caboose on the front, and that a train run in such manner was easily derailed by coming in contact with an obstruction on the track.

Chicago, etc., R. Co. v. Grimm, 494.

WAIVER—Of defect of parties, see PRACTICE, 1; *Ayres, Rec.*, v. *Foster*, 99.

WAREHOUSEMEN—

1. *Receipts.—Transfer.—Negotiable Instruments.—Bailment.*—A warehouse receipt transferred by mere delivery is not negotiable under §8722 Burns 1894, and the assignee takes the same subject to any defense existing at the time of the transfer or before notice thereof to the warehousemen. *Toner v. Citizens' State Bank*, 29.
2. *Damages.—Negligence.—Burden of Proof.—Instructions.*—An instruction in an action for damages to goods while in storage, to the effect that when plaintiff has shown that the bailee received the property in good condition, and returned it damaged, he has made out a *prima facie* case of negligence, but if defendant did account for the injury to the property in any manner consistent with the exercise of ordinary care on its part then plaintiff, in order to recover, must show that the damage occurred through negligence, states the law correctly. *Holt Ice, etc., Co. v. Arthur Jordan Co.*, 314.
3. *Damages.—Breach of Contract—Complaint.—Contributory Negligence.—Bailment.*—A complaint against a cold storage company for damages to butter stored which defendant, for a reasonable storage charge, paid by plaintiff, undertook and agreed to keep frozen and preserved, but which by its negligence was permitted to become contaminated by deleterious odors greatly diminishing its value, shows an action *ex contractu*, and is not defective because of its failure to negative contributory negligence on the part of the plaintiff. *Ib.*
4. *Damages to Butter in Storage.—Measure of Damages.—Negligence.*—In an action against a storage company for damages to butter from contamination by deleterious odors while in storage in defendant's warehouse under a contract of bailment, with no time fixed by the parties when the bailment should end, the measure of damages is the difference between the market value of the butter, at the time the bailment was ended by the parties, if it had been in good condition, and the market value thereof in its damaged condition at such time, although the butter was continued in storage after both parties knew that a part of it had become damaged. *Ib.*

WILLS—

Election by Widow.—Statutory Allowance.—Testator by the terms of his will gave all of his property real and personal to his wife, except certain partnership property. The widow caused the will to be probated and took possession of all of the property given her and disposed of the personal property for her own benefit, leaving the creditors of the estate without anything from the personal property to apply on their debts. She afterward for a valuable consideration conveyed her interest in the lands to creditors. *Held*, that she was not entitled to her statutory allowance of \$500.

Whetsell, Adm., v. Loudon, Adm., 257.

WITNESSES—SEE OPINION EVIDENCE; EVIDENCE.

A witness is not required to answer questions which might expose him to criminal prosecution, see **CRIMINAL LAW**, 4; *Baehner v. State*, 597.

Violation of court's order for separation of, see **TRIAL**, 6; *State ex rel. v. David*, 297.

As to the extent to which a witness may be cross-examined, see **TRIAL**, 2; *Baehner v. State*, 597; *Home Ins. Co. v. Sylvester*, 207.

Cross-examination of, see **TRIAL**, 7, 8; *Baehner v. State*, 597.

WORK AND LABOR—Farm hand a laborer not a tenant. See TRESPASS, 1; Heffelfinger v. Fulton, 33.

1. *Bill of Extras.—Breach of Contract.—Complaint.*—A charge in a complaint by a plastering contractor, in an action to recover for extra work and certain expenses incurred in carrying out his contract, that under the contract defendant was to notify plaintiff when to begin work, that he notified him, and plaintiff took a large number of men a distance of sixty miles to commence the work and found the building not ready, and was compelled to return again, at great expense, states a cause of action. *Brown v. Langner*, 538.

2. *Foreclosure of Laborer's Lien.—Complaint.*—In an action to recover for work and labor performed, and to foreclose a laborer's lien, if the complaint states facts sufficient to support a personal judgment, it will be good against a demurrer, although it may not state facts sufficient to justify a foreclosure of the lien.

Advance Mfg. Co. v. Auch, 687.

Ex. 1, 2, 3, 4, 5.

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